

(23,643)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 150.

JOSEPHINE P. MCGOWAN, EXECUTRIX OF JONAS H.
MCGOWAN, DECEASED, AND ELIJAH V. BROOKSHIRE,
APPELLANTS,

vs.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH,
DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

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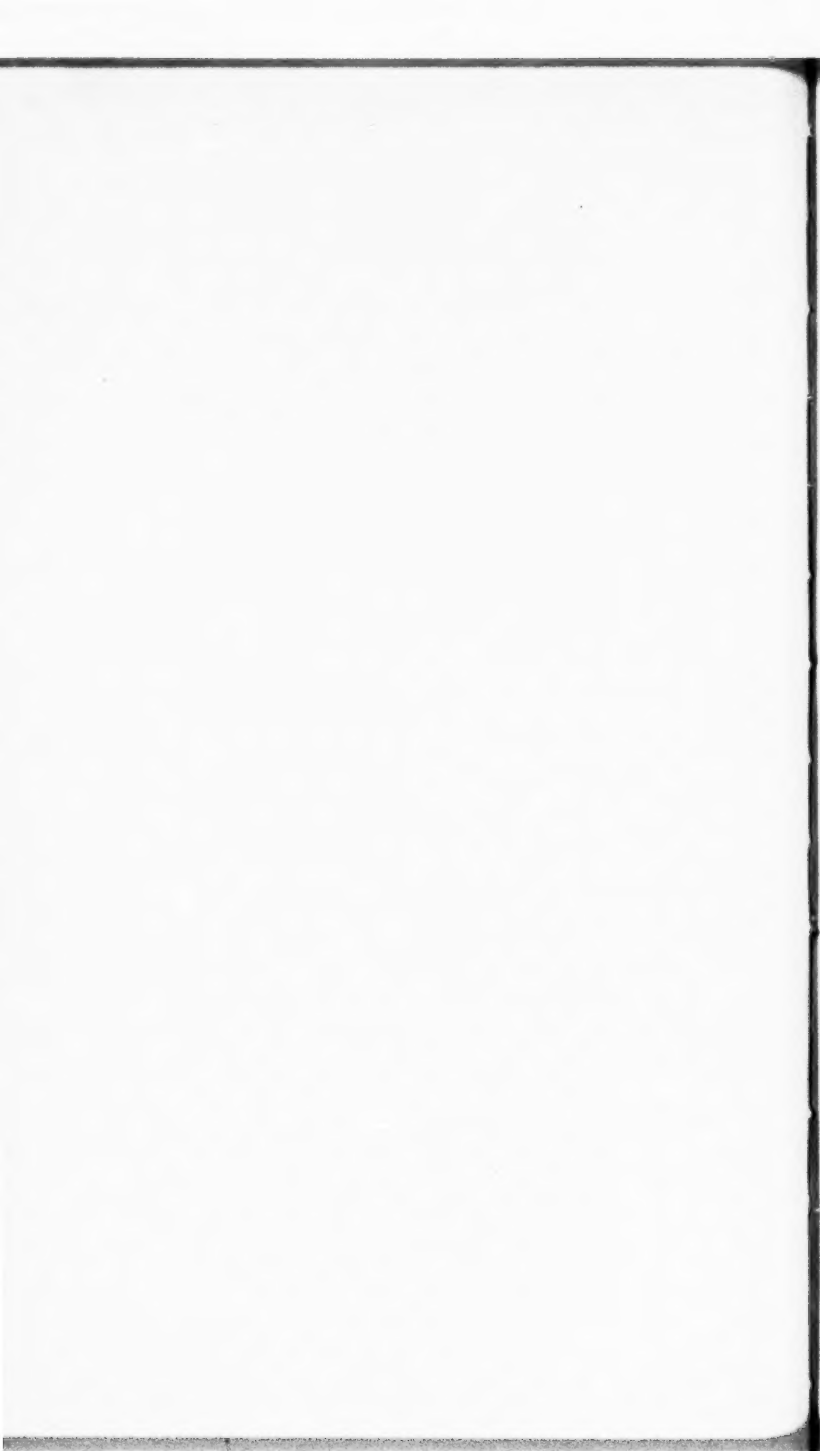
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1 In the Court of Appeals of the District of Columbia.

No. 2371.

EMILY E. PARISH, &c., Appellant,

vs.

JOSEPHINE P. MCGOWAN, &c., et al.

Supreme Court of the District of Columbia.

Equity. No. 28561.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE, Complainants,

vs.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill to Establish Lien, &c.

Filed May 22, 1909.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

In Equity. No. 28561.

JONAS H. MCGOWAN and ELIJAH V. BROOKSHIRE, Complainants,
versus

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased;
Franklin MacVeagh, Secretary of the Treasury of the United States of America, and Charles H. Treat, Treasurer of the United States of America, Defendants.

To the Supreme Court of the District of Columbia, holding a special term in equity:

The bill of complaint of Jonas H. McGowan and Elijah V. Brookshire, respectfully represents:

2 1. That the complainant Jonas H. McGowan is a citizen of the United States and a resident of the District of Columbia and brings this suit in his own right; and the complainant Elijah V. Brookshire is a citizen of the United States temporarily residing in the District of Columbia and brings this suit in his own right and as assignee of the said Jonas H. McGowan.

2. That the defendant Emily E. Parish is a citizen of the United States and a resident of the District of Columbia and is sued as the Executrix of Joseph W. Parish, deceased; that the defendant Franklin MacVeagh is the Secretary of the Treasury of the United States of America and is sued as such; and that the defendant Charles H. Treat is the Treasurer of the United States of America and is sued as such.

3. That on the fourth day of August, 1900, and for a long time prior thereto Joseph W. Parish, the defendant Emily E. Parish's testator, had and had asserted a claim against the United States for a certain large sum of money as balance alleged to be due him by virtue of a contract made by J. W. Parish and Company with Henry Johnson, a medical store keeper acting on behalf of the United States; and on the said fourth day of August, 1900, the said Joseph W. Parish entered into a contract with the complainant Jonas H. McGowan for the prosecution and collection of said claim, which said contract is in the words and figures following:

This Agreement made and entered into between Joseph W. Parish of Washington, District of Columbia, of the first part and J. H. McGowan, of the same place of the second part.

Witnesseth: That the party of the first part, hereby employs the party of the second part as his Attorney to prosecute and collect his claim against the United States of America, for ice furnished the Army under contract with the said United States during the war of the rebellion.

And in consideration of the professional services rendered and to be rendered by the party of the second part, and others whom he may employ in the prosecution of said claim, the party of the first part agrees and hereby binds himself, his heirs and legal representatives, to pay to the party of the second part, his heirs or legal representatives, a fee equal in amount to fifteen (15) per centum of whatever sum of money or other evidence of indebtedness may be awarded or collected on account of said claim.

It is likewise agreed that the party of the second part shall have control of the prosecution of said claim to its final termination, with power to receive and receipt for any draft or other evidence of indebtedness which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated.

And the party of the first part for himself, his heirs and legal representatives, further agrees to furnish all evidence and papers that may be lawfully required in the prosecution of said claim, and to execute from time to time, and deliver to the party of the second part such powers of attorney or other papers as may be necessary

3 for the prosecution and collection of said claim, and the payment of said fee.

It is further agreed that in no event shall the party of the first part sell, assign, transfer or otherwise dispose of said claim or any part thereof, and that this agreement shall not be affected in any particular by any revocation of the authority granted or which may be granted to the party of the second part, nor by any services rendered,

or which may be rendered, by others, or by the party of the first part, his heirs or legal representatives, or by any of them.

And the party of the second part agrees to diligently prosecute said claim to the best of his professional ability to its final determination.

Witness our hands and seals this Fourth day of August, A. D., 1900.

JOSEPH W. PARISH.
J. H. MCGOWAN.

That said Jonas H. McGowan was then and for a long time had been a lawyer engaged in the active practice of law in the District of Columbia and was a member of the bar of all of the courts in the District of Columbia and practiced largely before the Court of Claims and the Executive Departments and had a large and extensive experience in said practice. That for a long time prior to said last mentioned date the said complainant Jonas H. McGowan had rendered professional services as a lawyer to the said Joseph W. Parish in the preparation and prosecution of said claim. That after the said contract was entered into as aforesaid the said complainant Jonas H. McGowan continued diligently to render his professional services in the prosecution of said claim before the Congress of the United States and various committees thereof. That on the third day of December, 1902, the complainant Jonas H. McGowan and the said Joseph W. Parish, being desirous of securing the services of the complainant Elijah V. Brookshire as a lawyer in prosecuting the said claim in co-operation with the said complainant Jonas H. McGowan, made and executed an assignment to and agreement with the said Elijah V. Brookshire in the words and figures following:

Agreement.

For and in consideration of Five Dollars (\$5.) to me in hand paid, and other valuable consideration, I hereby sell, assign, transfer, and set over to Elijah V. Brookshire, the undivided one-third ($\frac{1}{3}$) interest in a contract made between Joseph W. Parish and myself, bearing date of the 4th day of August, 1900, and relating to the claim of said Parish against the United States for ice furnished to the Army under contract with the United States during the War of the Rebellion, in which said Parish agrees to pay me, for professional services rendered and to be rendered in the matter of said claim, a sum equal in amount to fifteen per centum (15%) of whatever sum of money or other evidence of indebtedness may be
4 awarded or collected on account of said claim. It being the intention of this assignment to convey to said Brookshire five per centum (5%), or the one-third ($\frac{1}{3}$) of whatever money may be paid me as provided in said contract. It being further understood that this agreement will terminate with services in the present Congress, providing the pending bill does not pass; but in case it does pass and become a law, will then terminate with the action of the

Secretary of War, and the final determination upon said claim for ice by the executive and disbursing officers of the Government.

In witness whereof, I have hereunto set my hand this 3rd day of December, 1902.

J. H. MCGOWAN.

Witnesses:

ARTHUR N. MARR.

That on or about the twentieth day of January, 1903, the said Joseph W. Parish and the complainant Brookshire entered into an agreement in the words and figures following:

For value received and for legal services heretofore rendered and to be rendered by E. V. Brookshire in the prosecution of my claim against the government of the United States, and which is more particularly described in Senate Bill No. 475, 1st Session, 57th Congress, I hereby agree to pay to said Brookshire a sum equal to five per centum of the amount awarded or appropriated for the payment of said claim. This contract to be an order upon the proper officer of the government or any one authorized to disburse said award so appropriated, and it is expressly understood that said Brookshire shall have a lieu for the amount due him upon the amount of the said award when the same is made.

In Witness whereof I hereunto set my hand this the 20th day of January, 1903.

J. W. PARISH.

Said Brookshire agrees to render necessary and proper legal services in the prosecution of the above described claim in the future under the direction of said Joseph W. Parish.

E. V. BROOKSHIRE.

4. Pursuant to the employment above mentioned and the agreements hereinbefore set forth, the said complainants in co-operation and together diligently prosecuted the said claim and rendered valuable legal and professional services in respect thereto and in preparing and making arguments before the proper committees in Congress, in collecting evidence and in filing and presenting to said committees petitions, briefs and arguments in their efforts to obtain an act of Congress for the relief of said Parish and providing for the settlement of said claim.

Thereafter, Congress passed an Act, approved on the seventeenth day of February, 1903, entitled "An Act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due." Said Act is in the words and figures following:

5 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a

contract made by J. W. Parish and Company with Henry Johnson, a medical store-keeper, acting on behalf of the United States, which contract bears date March fifth, eighteen hundred and sixty-three, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; Saint Louis, Missouri, and Cairo, Illinois, during the remainder of the said year eighteen hundred and sixty-three; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (One hundred and tenth United States Reports, page three hundred and thirty-eight), and in accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish and Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated.

(32 Stats. 1612-1613.)

Immediately after the passage of said Act, which was drafted by the complainant Jonas H. McGowan and which was advocated and urged in all proper ways before the several committees of the House and Senate by both complainants, the Secretary of the Treasury of the United States, Leslie M. Shaw, referred to the proper officer of the government and of the Treasury, viz., to the Auditor for the War Department, the claim of the said Joseph W. Parish, referred to in said Act of Congress, and the papers relating thereto. The complainants appeared before the said Auditor and rendered valuable professional services in the consideration of said claim and the papers relating thereto and filed briefs and arguments in support of the contentions made on behalf of the said Joseph W. Parish. On or about the eleventh day of August, 1903, the said Auditor made a finding in respect of said claim, and found and declared that there was a balance due to the said Joseph W. Parish of

6 one hundred and eighty-one thousand, three hundred and fifty-eight dollars and ninety-five cents (\$181,358.95); and on the said eleventh day of August, 1903, the said Auditor sent to the complainant Jonas H. McGowan notice of the allowance of said claim in the words and figures following:

Notice of Allowance of Claim.

Treasury Department, Office of Auditor for the War Department.

Claim No. 143,880, File No. 58743.

WASHINGTON, D. C., August 11, 1903.

To Joseph W. Parish, care of Attorney, J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due you under Act of Congress app'd Feb. 17, 1903 (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled, as shown in the following statement and settlement certificate No. 23729, transmitted to the Secretary of the Treasury for payment:

Amount Claimed.	Amount Disallowed.	Amount Allowed.
.....	\$181,358.95

Respectfully,

F. E. RITTMAN, Auditor,
By W. A. R.

Copy.

"Any person accepting payment under settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted. * * * Any person whose accounts may have been settled by an Auditor of the Treasury Department * * * may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive."—Section 8, Act July 31, 1894.

On receiving the said finding and award from the said Auditor, the said Secretary of the Treasury referred the same and the papers appertaining thereto to the Comptroller of the Treasury, Robert J. Tracewell, for examination and report. The complainants appeared before said Comptroller and submitted to him elaborate arguments. The Comptroller returned said papers with an adverse report to the Secretary of the Treasury and thereupon further consideration was given to the said award by the Secretary of the Treasury and the same then referred to the Solicitor of the Treasury, before whom the complainants appeared and again made further arguments. The Solicitor of the Treasury returned the said claim to the Secretary of the Treasury with an opinion adverse to the payment of the same. Thereupon the said Secretary of the Treasury again considered the said claim and the same was again argued before him by the complainants at great length and after preparations involving great labor. On or about the thirty-first day of May, 1904, the said Secretary of the Treasury

declined and refused to pay to the said Joseph W. Parish the balance ascertained to be due by the Auditor for the War Department or any balance or sum whatever, and on the day aforesaid expressed his final decision and refusal to carry out and give effect to said award.

5. After the aforesaid decision so made and declared by the said Secretary of the Treasury the complainants advised with the said Joseph W. Parish in respect of the steps necessary and proper to be taken to enforce payment of said award or to obtain the payment of the said claim, and had especially under advisement and consideration the propriety and expediency of filing in the Supreme Court of the District of Columbia a petition for the writ of mandamus to compel the said Secretary of the Treasury to issue a draft in favor of the said Parish for the sum of one hundred and eighty-one thousand, three hundred and fifty-eight dollars and ninety-five cents (\$181,358.95) found to be due as aforesaid by the Auditor for the War Department and were still considering and still had under advisement the filing of a petition for the writ of mandamus as aforesaid and were awaiting the return of the said Joseph W. Parish to the said District of Columbia, from which he had been absent for some time, until the time of his death, which occurred in the City of Washington on the twenty-sixth day of December, 1904.

For a long time prior to the death of the said Joseph W. Parish he and his family had been in very necessitous circumstances and in order to relieve their pressing wants, both of the complainants from time to time advanced to him for the benefit of himself and family various sums of money, amounting in the aggregate to the sum of five thousand dollars (\$5,000), relying solely upon his promise to repay the sums so loaned out of what might be recovered in respect of said claim.

6. After the death of the said Parish, to wit, on the third day of April, 1905, the will of the said Joseph W. Parish was presented to the Supreme Court of the District of Columbia, holding a probate court, by the defendant Emily E. Parish, daughter of said Joseph W. Parish, who was named in the said will as his Executrix. On the seventh day of April, 1905, the said will was admitted to probate and record by the said court and letters testamentary were issued to the said Emily E. Parish as Executrix of the said will, she first having executed a bond to the United States, with good and sufficient security approved by the said court, in the penalty of five hundred dollars (\$500), conditioned for the faithful performance of her duties.

It was stated to the Probate Court that the estate of Said Joseph W. Parish consisted of his claim against the United States and his wearing apparel. Since the probate of said will there have been presented to the probate court as claims against said estate

8 claim of D. Christofani for groceries furnished and money loaned, amounting to nine thousand, one hundred and sixty dollars and seventy cents (\$9,160.70) and the claim of said Emily E. Parish for twelve thousand dollars (\$12,000) alleged to be due

under a contract for services rendered, and miscellaneous claims amounting in all to about fifteen hundred dollars (\$1500). No account has been filed by the said Executrix.

7. After the death of the said Joseph W. Parish and the issue of letters testamentary to the Executrix, disregarding the rights of these complainants and their interests in the subject matter of the claim of said Joseph W. Parish against the United States, and the services rendered by these complainants in the assertion and prosecution of said claim, and well knowing that complainants were ready and willing to render their services in the further prosecution of said claim, the defendant, Emily E. Parish, Executrix as aforesaid, employed other counsel and attorneys without consulting with or advising complainants, for the further prosecution and collection of said claim. And on the 2nd day of May, 1906, said Emily E. Parish, Executrix as aforesaid, by her attorneys, filed in the Supreme Court of the District of Columbia her petition for a writ of mandamus to the Secretary of the Treasury, requiring him to issue a draft in favor of said Emily E. Parish, for the sum of one hundred and eighty-one thousand, three hundred and fifty-eight dollars and ninety-five cents found to be due the said Joseph W. Parish by the Auditor for the War Department, as hereinbefore set forth, basing her said petition solely upon the ground that "every condition precedent to payment to said Joseph W. Parish in accordance with said Act of February 17, 1903, has been satisfied by the examination and settlement made on August 11, 1903, by the Auditor for the War Department," which examination and settlement were the result, exclusively of the services of the complainants under their said contracts, and that, therefore, there remained only the ministerial duty on the part of the Secretary of the Treasury to pay the amount allowed by the Auditor as a result of the said services of the complainants, as will appear more fully from the transcript of record in said cause, entitled United States ex relatione Emily E. Parish, Executrix of Joseph W. Parish, deceased, versus George Bruce Cortelyou, Secretary of the United States Treasury, and numbered 111, October Term, 1908, in the Supreme Court of the United States, a copy of which transcript of record is filed herewith and made a part hereof, marked Complainant's Exhibit No. 1.

To the said petition the respondent named therein filed his answer, to which answer a demurrer was interposed, and said demurrer was by the said Court, on the 13th day of February, 1907, overruled and by the judgment of said Court said petition was dismissed at the cost of the petitioner.

From the judgment of the Supreme Court of the District of Columbia the said Emily E. Parish, Executrix as aforesaid, noted and perfected her appeal to the Court of Appeals of the District of Columbia, and said Court of Appeals by its judgment entered on the fourth day of June, 1907, affirmed the judgment of the

9 Supreme Court of the District of Columbia.

Upon the rendition of the said judgment of the said Court of Appeals, the said petitioner, by her attorney, prayed for and obtained a writ of error from the Supreme Court of the United States

to said Court of Appeals removing said cause to said Supreme Court of the United States, and said Supreme Court by its judgment and mandate rendered on the 17th day of May, 1909, reversed the judgment of the Court below, the said Court of Appeals of the District of Columbia, and by its judgment sustained the demurrer to the answer to said petition, and ordered and directed the writ of mandamus to issue as prayed in said petition.

8. Complainants are informed and believe and on information and belief aver that the mandate of the Supreme Court of the United States will forthwith be sent down to the Court of Appeals of the District of Columbia, and that the mandate of the said Court of Appeals will forthwith be sent down to the Supreme Court of the District of Columbia, and that the said writ of mandamus will thereupon be immediately issued to the Secretary of the Treasury, commanding him to issue a draft in favor of Emily E. Parish, Executrix as aforesaid, or to her agents or attorneys, for the sum of \$181,358.95. And your complainants are further informed and believe and on information and belief aver that it is the expressly declared intention, will and purpose of the said Emily E. Parish, her agents and attorneys, to ignore and refuse to recognize the lien and claim of your complainants in and to the said fund of \$181,358.95, created and established in and by the contracts and agreements hereinbefore mentioned and set forth, and by the valuable and indispensable service of your complainants rendered in the prosecution of said claim; but, on the contrary, said defendant Emily E. Parish and her brother Grant Parish have avowed and declared that they, the said complainants, shall never have a cent of said money. As hereinbefore set forth, the estate of said Joseph W. Parish is, except for the claim above-mentioned, insolvent, and claims aggregating about \$25000 have been filed and proved against said estate in the Supreme Court of the District of Columbia, holding a special term as a Probate Court, but none of said claims have been paid in whole or in part. As your complainants are informed and believe and on information and belief aver, both Emily E. Parish and Grant Parish are insolvent and if they receive into their hands the draft of the proceeds of the draft about to be issued by the Secretary of the Treasury, they will immediately take the same out of the jurisdiction of this Court for the purpose of defrauding and defeating complainants of their rightful lien and claim on the said fund.

9. That by reason of the premises and of the professional services so severally rendered by the complainants and each of them as aforesaid, and by reason of the terms, operation and effect of the aforesaid agreements and of the aforesaid finding and award of the said Auditor so made as aforesaid, the complainant Jonas H. McGowan and the complainant Elijah V. Brookshire severally became and is the equitable owner of the tenth part or ten per centum of the said finding and award and of the said sum of \$181,358.95 therein specified, and are entitled to have paid to each of them and to receive one-tenth part of the amount of said award and finding, and each one has a lien on said award and finding for and

in respect of the one-tenth part of said award and finding, and the amount thereof and the moneys due and payable in respect thereof, and each one is entitled to receive, demand and receipt for the one-tenth part or portion of any and all moneys that are or shall be paid in respect thereof.

Wherefore and for the reasons aforesaid, the complainants being without adequate remedy at law, pray equitable relief as follows:—

First. That this Court will determine and decree that the complainant Jonas H. McGowan is the equitable owner of and is entitled to ten per centum of one-tenth part of the said award and finding and of the sum of \$181,358.95, specified therein, and is entitled to be paid and to receive and receipt for ten per centum or one-tenth part of all moneys paid in respect thereof, and has an equitable lien on said finding and award and on the moneys made payable thereby to the amount and respect of the sum of \$181,135.89; and that the complainant Elijah V. Brookshire is the equitable owner of ten per centum or one-tenth part of the said award and finding and of the sum of \$181,358.95, specified therein, and is entitled to be paid and to receive and to receipt for ten per centum or one-tenth part of all moneys paid in respect thereof, and has an equitable lien on said finding and award and on the money payable and that may be paid thereunder to the amount and in respect of \$18,135.89.

Second. That the defendant Emily E. Parish, Executrix of the last will and testament of the said Joseph W. Parish, deceased, as aforesaid, her attorneys, agents and representatives, and each of them, may be severally and perpetually enjoined from applying for, demanding or receiving from the Government of the United States, or any officer thereof, and from the Secretary of the Treasury of the United States, or from any officer of the Treasury of the United States, any draft, check, order or warrant for the payment of the said award and finding, or money specified therein or any part thereof, and from applying for, demanding or receiving from the Government of the United States, or any officer thereof, or from the Secretary of the Treasury of the United States, or any officer thereof, the one-tenth part of said award and of the money specified therein belonging to and claimed by the complainant Jonas H. McGowan as aforesaid, or the one-tenth part of said award and of the money specified therein belonging to and claimed by the complainant Elijah V. Brookshire as aforesaid.

Third. That the defendant Franklin MacVeagh, Secretary of the Treasury of the United States, and the defendant Charles H. Treat, Treasurer of the United States, their and each of their successors, may be enjoined from issuing any draft, check, warrant or order to the said defendant Emily E. Parish, Executrix of the last will and testament of the said Joseph W. Parish, deceased, or to her or to any of her attorneys, agents or representatives, or either or any of them, for the payment of said award or finding, or for
11 the payment of the said sum of one hundred and eighty-one thousand, three hundred and fifty-eight dollars and ninety-five cents or any part thereof.

Fourth. That a receiver may be appointed by this Court with authority to demand and receive of and from the United States of America and from the Honorable Franklin MacVeagh, Secretary of the Treasury aforesaid, and from the Honorable Charles H. Treat, Treasurer of the United States as aforesaid, their successors or successors, the payment of the said award or finding and of the sum of one hundred and eighty-one thousand, three hundred and fifty-eight dollars and ninety-five cents, specified in and made due and payable by said award and finding, and to receipt for the same in his possession, subject to the further order of this Court.

Fifth. That the defendant Emily E. Parish, Executrix as aforesaid, her attorneys, agents and representatives, and each of them, be restrained and enjoined by a preliminary injunction or restraining order to be issued forthwith from applying for, demanding or receiving from the Government of the United States, or any officer thereof, and from the Secretary of the Treasury of or from any officer of the Treasury of the United States *the United States*, any draft, check, order or warrant for the payment of the said award and finding or money specified therein or any part thereof, and from applying for, demanding or receiving from the Government of the United States, or any officer thereof, or from the Secretary of the Treasury of the United States or any officer thereof, the one-tenth part of said award or the moneys specified therein belonging to and claimed by the complainant Jonas H. McGowan, as aforesaid, or the one-tenth part of said award and of the money specified therein belonging to and claimed by the complainant Elijah V. Brookshire, as aforesaid.

Sixth. That the defendant Franklin MacVeagh, Secretary of the Treasury of the United States, and the defendant Charles H. Treat, Treasurer of the United States, their and each of their successors, may be enjoined and restrained by a preliminary injunction or restraining order to be issued forthwith, from issuing any draft, check, warrant or order to the said defendant Emily E. Parish, Executrix of the last will and testament of the said Joseph W. Parish, deceased, or to her or to any of her attorneys, agents or representatives, or any of them, for the payment of said award or finding, or for the payment of the said sum of one hundred and eighty-one thousand three hundred and fifty-eight dollars and ninety-five cents, or any part thereof.

Seventh. That the complainants may have such other and further relief as they may appear to be entitled to in the premises and this Court is competent to grant.

Eighth. That process may issue out of this Court to the said Emily E. Parish, Executrix of the said last will and testament of the said Joseph W. Parish, deceased, and to the Honorable Franklin MacVeagh, Secretary of the Treasury, and to the Honorable Charles

H. Treat, Treasurer of the United States, commanding them

12 and each of them to appear and make answer to this bill of complaint, but not under their respective oaths, which are hereby waived, and to abide by and perform the orders and decrees of the Court in the premises.

The defendants to this bill of complaint are Emily E. Parish, Executrix of Joseph W. Parish, deceased; Franklin MacVeagh, Secretary of the Treasury of the United States of America, and Charles H. Treat, Treasurer of the United States of America.

JONAS H. MCGOWAN,

ELIJAH V. BROOKSHIRE,

Complainants.

NATH'L WILSON &

CLARENCE R. WILSON,

J. J. DARLINGTON,

Solicitors for Complainants.

DISTRICT OF COLUMBIA, ss:

Jonas H. McGowan, being first duly sworn, on oath deposes and says that he has read the foregoing and annexed bill of complaint by him subscribed and knows the contents thereof, and that the matters and things therein stated as of his own knowledge are true and those stated on information and belief he believes to be true.

JONAS H. MCGOWAN.

Subscribed and sworn to before me this 22d day of May, 1909.

[SEAL.]

RYLAND W. JOYCE,

Notary Public in and for the District of Columbia.

DISTRICT OF COLUMBIA, ss:

Elijah V. Brookshire, being first duly sworn, on oath deposes and says that he has read the foregoing and annexed bill of complaint by him subscribed and knows the contents thereof, and that the matters and things therein stated as of his own knowledge are true and those stated on information and belief he believes to be true.

ELIJAH V. BROOKSHIRE.

Subscribed and sworn to before me this 21st day of May, 1909.

[SEAL.]

E. L. WHITE,

Notary Public in and for the District of Columbia.

Order Dismissing Bill as to Certain Defendants, &c.

Filed June 2, 1909.

* * * * *

This cause coming on to be heard this Second day of June, 1909, by the consent of the complainants and the solicitors of Emily E. Parish, Executrix of Joseph W. Parish, deceased, it is adjudged and decreed that the restraining order granted on the 22nd day of 13 May, 1909, enjoining and restraining the said Emily E. Parish, Executrix of Joseph W. Parish, deceased, from applying for or demanding or receiving from the Government of the United States, or any officer thereof, any order or warrant for the payment of the award or finding mentioned in the bill of complaint,

and enjoining and restraining the said Franklin MacVeagh, Secretary of the Treasury, and Charles H. Treat, Treasurer of the United States, from issuing any draft, check, warrant or order to the said Emily E. Parish or to any of her attorneys, agents, or representatives for the payment of said award or finding, be and the same is hereby dissolved, and that the said bill of complaint be and the same is hereby dismissed as to the said Franklin MacVeagh, Secretary of the Treasury, and Charles H. Treat, Treasurer of the United States.

And it is further adjudged and decreed that said restraining order be and the same is hereby dissolved as to the said Emily E. Parish, Executrix of Joseph W. Parish, deceased, as aforesaid, provided, however, and it is adjudged that in respect of the sum of forty-one thousand dollars and in respect of any warrant, draft or check that may be issued therefor by the Treasury Department, or any officer thereof, as being a part of the award or finding for the sum of one hundred and eighty-one thousand three hundred and fifty-eight dollars and ninety-five cents (\$181,385.95) which, by the judgment of the Supreme Court of the United States, announced on the 17th day of May, 1909, the Secretary of the Treasury was directed to pay the said Emily E. Parish, Executrix of Joseph W. Parish, deceased, is enjoined and prohibited from receiving any warrant or draft for said sum of forty-one thousand dollars (\$41,000.00), or any part thereof, from the Treasury Department or any official thereof, and from receiving said sum of money, or any part of it, and is hereby required and directed to make and execute a proper power of attorney authorizing and empowering Corcoran Thom, Vice-President of the American Security and Trust Company, to receive any warrant, draft or check that may be issued in respect of said sum of forty-one thousand dollars (\$41,000) and to endorse the same for her and in her name as Executrix of the said Joseph W. Parish, deceased, and to receive and collect the proceeds thereof and forthwith to deposit the same when received with the American Security and Trust Company, of Washington, D. C., to the credit of this cause and subject to the further order of this Court herein and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint. Said American Security and Trust Company shall hold the said sum of forty-one thousand dollars (\$41,000.00), so deposited with it, without being entitled to compensation for holding or disbursing the same, and shall pay interest thereon at the rate of two per cent per annum from the date of its deposit as aforesaid, the said sum and the accrued interest thereon to be subject to the order and decree of this court in this cause.

JOB BARNARD, *Justice.*

14

We consent to the entry of the above decree.

NATH'L WILSON,

Sol. for Compl'ts.

LEIGH ROBINSON,

For Defendant, Emily E. Parish, Executrix.

Memorandum.

August 2, 1909.—Death of Complainant Jonas H. McGowan suggested to the Court.

Appearance and Adoption of Bill by Josephine P. McGowan.

Filed August 2, 1909.

* * * * *

Now comes Josephine P. McGowan, Executrix of the Estate of Jonas H. McGowan, deceased, and submits herself to the jurisdiction of the Court and prays that she be made a party complainant hereto and as such be allowed hereby to adopt as her own the bill of complaint heretofore filed herein by said Jonas H. McGowan and to prosecute this suit as the legal representative of said Jonas H. McGowan, deceased.

JOSEPHINE P. MCGOWAN,
Executrix of Jonas H. McGowan.

NATH'L WILSON,
CLARENCE R. WILSON,
Sol'rs.

Order Substituting Josephine P. McGowan as Complainant.

Filed August 2, 1909.

* * * * *

Upon the suggestion of the death of Jonas H. McGowan, complainant herein, and upon the appearance and submission to the jurisdiction of the Court of Josephine P. McGowan, Executrix of the Estate of said Jonas H. McGowan, deceased, it is by the Court this 2nd day of August, 1909,

Ordered that said Josephine P. McGowan, Executrix of the Estate of Jonas H. McGowan, deceased, be and she hereby is substituted as a party complainant in the place and stead of Jonas H. McGowan, deceased, and as such complainant be and is hereby allowed to adopt the bill of complaint heretofore filed herein and to prosecute this action as the legal representative of said Jonas H. McGowan, deceased.

ASHLEY M. GOULD, *Justice.*

15

Answer.

Filed September 29, 1909.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

Equity. No. 28561.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE, Complainants,

vs.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased.

The Answer of Emily E. Parish, Sued as Executrix of Joseph W. Parish, Deceased, to the Bill of Complaint.

This defendant admits the first and second paragraphs of the bill.

In response of the third paragraph of the bill, this defendant admits that on the 4th day of August, 1900, and for a long time prior thereto, Joseph W. Parish, the testator of the defendant, had and had asserted a claim against the United States for a certain large sum of money as balance alleged to be due him by virtue of a contract made by J. W. Parish & Company with Henry Johnson, a medical storekeeper acting on behalf of the United States. But this defendant has no personal knowledge of the agreement alleged to have been made and entered into on the said 4th day of August, 1900, between her said testator and the complainant McGowan. She therefore, can neither admit nor deny the same, but calls for strict proof thereof. Nor does this defendant know the extent of the practice of said McGowan in the Courts of this District; the Court of Claims, and the Executive Departments; nor to what extent said McGowan had rendered professional service to said Parish. She can, therefore, neither admit nor deny the allegations respecting the same, but calls for strict proof thereof. Nor has this defendant any personal knowledge of the assignment alleged to have been made on December 3rd, 1902, by said McGowan, assigning a one-third interest in the aforesaid alleged contract to the complainant Brookshire; therefore neither admits nor denies the same, but calls for strict proof thereof. Nor has this defendant any personal knowledge of the agreement alleged to have been made on the 20th of January 1903 between the said Joseph W. Parish and complainant Brookshire; therefore neither admits nor denies the same, but calls for strict proof thereof.

This defendant is advised, that because of the joinder in the suit against her of what is really a cause of action between the complainant McGowan and the complainant Brookshire; and because of the joinder in the same suit of two wholly distinct and uncon-

16 nected claims against the said Estate of her testator, arising under alleged wholly distinct and unconnected contracts, with distinct and unconnected plaintiffs, it would be open to her to take by demurrer the objection of multifariousness. She has no desire, however, to split into two suits any valid claims which the parties plaintiff may be deemed to have presented by their bill, and, therefore foregoes the advantage of any demurrer she might file on that ground. This question of the validity of said contracts, she is advised, presents a more serious question, and one which she is not at liberty to waive or ignore. This defendant is advised, insists, and so charges, that by the provision in said alleged contract between said Parish and said Mr. McGowan whereby in advance of any allowance of the claim of said Parish, there is assigned to said McGowan "power to receipt for any draft, or other evidence of indebtedness which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated"; an agreement was sought to be made which is in violation of section 3477 of the Revised Statutes of the United States; and which by said Statute is declared to be null and void. She is advised and insists that the same is true of the alleged contract of said Parish with said Brookshire, whereby it is provided, "that said Brookshire shall have a lien for the amount due him upon the amount of said award, when the same is made." The alleged contract between said McGowan and said Brookshire is the assertion by the said McGowan, not only of an assignment already made to himself of an interest in a claim against the Government; but of a transfer so absolute as to vest in him the power to assign a portion of that interest to another, before any claim whatever had been allowed. This defendant is advised and insists and so charges, that nothing could be more plainly null and void under said section 3477, than a contract which sought such absolute dominion over a claim against the Government. But were the same valid, it would be a claim against said McGowan.

Said Section 3477 provides, "all transfers and assignments made of any claims upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer and it must appear by the certificate, that the officer, at the time of the acknowledgment, read and fully explained the transfer assignment, or warrant of attorney to the person acknowledging the same."

17 This defendant has, however, joined in the consent for a decree in this cause, which, by consent of the parties hereto, was passed by the Court, whereby the sum of Forty-one Thousand Dollars, or a sum far more than enough to satisfy in toto the whole claim made by both complainants, was directed to be deposited "with the American Security and Trust Company to the credit of this cause, and subject to the determination by this Court in this cause, whether any amount, and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint." This defendant is advised and being so advised charges, that the utmost which either complainant could claim for legal services would depend upon their reasonable value; and that their reasonable value would depend upon what legal services, if any, have been rendered. In directing attention to the inhibition interposed by said Section 3477, to the relief prayed for, in the bill, viz: that the Court decree that said Jonas H. McGowan "has an equitable lien on said finding and award, and on the moneys made payable thereby to the amount and respect of the sum of \$18,135.89"; and that the complainant Elijah V. Brookshire "has an equitable lien on said finding and award, and on the moneys payable, and that may be paid thereunder to the amount and in respect of \$18,135.89;" the object of defendant is not to secure the transfer to another forum of any valid contention, which it is in the power of complainants to make under their alleged contracts, but simply to exhibit, as her duty requires, the limitations imposed by law thereon, in whatever forum the same may be adjudicated.

In response to the 4th paragraph of the bill this defendant admits that Congress did pass the act, approved on the 17th day of February, 1903, as set out in the bill; but can neither admit nor deny, whether said complainants did advocate and urge the same "in all proper ways before the several committees of the House and Senate" and "before the Auditor of the War Department"; and calls for strict proof thereof. She admits that on or about August 11th, 1903, the said Auditor for the War Department found and declared that there was a balance due to the said Joseph W. Parish of \$181,358.95, and sent to said Jonas H. McGowan the notice of allowance of claim set out in the bill. She also admits, that "on or about the 31st of May, 1904, the said Secretary of the Treasury declined and refused to pay to the said Joseph W. Parish the balance ascertained to be due by the Auditor of the War Department, or any balance or sum whatever, and on the day aforesaid expressed his final decision and refusal to carry out and give effect to said award." Further answering said paragraph this defendant says, that on the 26th day of January, 1904, the said Auditor "revised his said statement and found that nothing was due."

In response to the 5th paragraph of the bill, this defendant denies that after the decision so made and declared by the Secretary of the Treasury, "the complainant- advised with the said Joseph W. Parish in respect to the steps necessary and proper to be taken to enforce

payment of said award or to obtain the payment of the said claim, and had especially under advisement and consideration the propriety and expediency of filing in the Supreme Court of the

18 District of Columbia a petition for the writ of mandamus to compel the said Secretary of the Treasury to issue a draft in favor of the said Parish for the sum of \$181,358.95 found to be due as aforesaid by the Auditor for the War Department, and were still considering, and still had under advisement the filing of a petition for the writ of mandamus as aforesaid and were awaiting the return of the said Joseph W. Parish to the District of Columbia, from which he had been absent for some time, until the time of his death which occurred in the City of Washington on the 26th of December, 1904." This defendant denies each and all of these allegations; and while it is true her father was absent from the City in the summer of 1904, she denies that he was absent therefrom for any length of time prior to his death on the 26th of December, 1904. In further answer to said paragraph this defendant avers that never once did the said complainants approach her (after her father's death and after her qualification as his Executrix) "in respect of the steps necessary and proper to be taken to enforce payment of said award." In the long interval between the refusal by the Secretary to pay and the filing of the suit in mandamus, the suggestion of mandamus as the remedy "to enforce payment of said award" came to her for the first time from the counsel who filed said mandamus suit in her behalf. From no others did she ever hear of that remedy, or of any other, if other there could be. This defendant says that by actions which spoke louder than words, said complainant after the aforesaid refusal by the Secretary, abandoned all prosecution of the claim of her testator against the United States; and sought not by any spoken word to correct that which their action or non-action so impressively conveyed.

This defendant has no knowledge of the alleged loan of \$5000., and therefore can neither admit nor deny the same but calls for strict proof thereof. Further answering she says that if said indebtedness did exist it was a simple contract indebtedness, which, like any other, might have been filed without delay; like any other was payable out of the general assets; and like any other simple contract obligation, was barred, if not pursued within the Statutory time. She now expressly pleads the provision of the Statute of limitations in force in this District in bar thereof.

In response to Sixth paragraph, this defendant says: It is true that on the 5th day of April, 1905, the Will of said Joseph W. Parish was admitted to probate and record, and letters testamentary issued to this defendant, she executing a bond in the sum of \$500.00 conditioned for the faithful performance of her duties; and that after the probate of said Will, there had been presented against said Estate the claim of D. Christofani amounting to \$9160.70, and the claim of this defendant for \$12,000.00, and miscellaneous claims amounting in all to about \$1500. Although true at the time of the filing of said bill, it is no longer true, that "no account has been filed by the said Executrix."

19 In answer to the 7th paragraph of the bill, this defendant denies, that after the death of the said Joseph W. Parish, and the issue of letters testamentary to her, she disregarded the rights of the complainants and their interests in the subject matter of her father's claim against the United States; denies that "well knowing that complainants were ready and willing to render their services in the further prosecution of said claim, the defendant Emily E. Parish, Executrix, as aforesaid, employed other counsel; for she says, that from May 31st, 1904, when payment was refused by the Secretary of the Treasury, to the 2nd of May, 1906, when her mandamus suit was filed, the said complainant did not, nor did either of them, ever impart to this defendant their readiness or willingness to institute a mandamus suit, or any other suit for the enforcement of her right. Far from this, even after said mandamus suit had been instituted, on information and belief, she avers, that at least one of the complainants did repeatedly assert that the remedy by mandamus was inapplicable and could not be maintained. It is, however, true that said Emily E. Parish, Executrix, "employed other counsel and attorneys without consulting or advising complainants for the further prosecution and collection of said claim"; and said Executrix, is, at this date, wholly unaware why she should have consulted with complainants in respect to a matter concerning which said complainants had lapsed into such obstinate and ominous silence, and of whose alleged contracts with her testator she was altogether ignorant. It is true, that on the 2nd of May, 1906, said Emily E. Parish, Executrix, filed her petition for a writ of mandamus to the Secretary of the Treasury requiring him to issue a draft in favor of said Executrix for the sum of \$181,358.95, in accordance with what at one time had been the finding of the Auditor for the War Department. It is not true, however, as is sought to be implied, that everything needed to gain the case, had been accomplished by the act of February 17, 1903, aided by the finding of the Auditor for the War Department thereafter. For as is well known to complainants, the finding of the Auditor for the War Department had been cancelled when the petition for mandamus was filed. As is well known to Complainants, the Secretary of the Treasury held that under the Act of February 17, 1903, the said Parish was entitled to nothing. As is well known to the Complainant, the Supreme Court of this District could discover no way by which under said act, could be changed in any respect this decision of the Secretary. As is well known to complainants, this judgment was affirmed by the Court of Appeals of this District. Therefore it should be evident to complainants, that said act of February 17, 1903, did not and could not automatically work out the result which was finally achieved. It is also true as stated therein, that the Supreme Court of the United States, by its judgment rendered on the 17th day of May, 1909 reversed the judgment of the said Court of Appeals of the District of Columbia, sustained the demurrer to the return to the petition, and "directed the writ of mandamus to issue as prayed in said petition."

In response to the 8th paragraph of the bill, this defendant denies that it is the intention, will and purpose of said Emily E. Parish, her agents and attorneys to ignore and refuse to recognize any valid claim against the Estate of her testator; denies that none of the claims filed and proved against the Estate in the Probate Court have been paid in whole or in part; but on the contrary avers that all such have been paid and satisfied; and in consequence her account passed and approved. She denies that she is insolvent, and denies that her brother is insolvent, and as to the last sentence of said paragraph, she says that a sum more than sufficient to satisfy the alleged claims of these complainants is now in the custody of the Court to await the judicial determination of the validity of the claims alleged; but she again denies that complainants have a "rightful lien and claim to and on said fund."

This defendant denies that by reason of the premises "the complainant Jonas H. McGowan and the complainant Elijah V. Brookshire severally became and is the equitable owner of the 10th part or ten per centum of the said finding and award, and of the said sum of \$181,358.95 therein specified, and are entitled to have paid to each of them, and to receive one-tenth part of the amount of said award and finding, and each one has a lien on said award and finding, for and in respect of the one-tenth part of said award and finding." This defendant says once more, that the claim made is in violation of law.

Further answering, this defendant says, that by Section 330 of the Code of Law in force in this District the Executrix was not allowed to pay claims against the Estate, unless and until the same have been passed and approved by the Probate Court; that on the same day on which letters testamentary issued to her, to wit, on April 7th, 1905, this defendant ordered to be published her notice to "all persons having claims against the deceased," thereby warning them "to exhibit the same with the vouchers thereof legally authenticated to the subscriber on or before the 7th day of April, 1906," or "otherwise they may by law be excluded from all benefit of said Estate," and the same thereafter was duly published. The appropriation to pay said Parish was made by the act of February 17, 1903; the exact amount to be paid thereunder, was ascertained by the Auditor for the War Department on August 11th, 1903. Ever since the date last mentioned, the said Brookshire has known the exact amount of the percentage claimed by him; and yet never once exhibited the same with the vouchers thereof legally authenticated to this defendant, although warned that otherwise he might "by law be excluded from all benefits of said Estate"; and this defendant says and charges that he is excluded therefrom; and further the said alleged contract, not purporting to be other than a simple contract, and no action of any kind or nature having been brought for the recovery of the claim based thereon, within three years after the appropriation for the payment thereof, or within three years after April 7th, 1905, when letters testamentary were issued to her, the same is barred, and she pleads the Statute in force in this District in bar thereof.

Further answering this defendant is advised, and being so advised, charges that the utmost the complainant McGowan could claim for legal services which had been rendered in satisfaction of his alleged contract, would be their reasonable value; and that payment on this account would have to be made out of the general assets, since they would not and could not become obligatory by virtue of the alleged lien, sought to be created in violation thereof. A claim, therefore, could have been filed at any time between the 7th day of April, 1905, when letters testamentary were issued to this defendant; and the 7th day of June, 1909, when her first and final account was filed and approved; and the said McGowan having been (together with all others) duly warned to exhibit his claim against the Estate, "with the vouchers thereof legally authenticated" to the Executrix, and having failed to do so at any time prior to the approval of her first and final account on the 7th of April, 1909, is properly by law "excluded from all benefit of said Estate."

Further answering this defendant says; that by the said alleged contract of August 4th, 1900, between said Joseph W. Parish and said J. H. McGowan it is expressly stipulated and provided, that "the party of the second part (said McGowan) agrees to diligently prosecute said claim to the best of his professional ability to its final determination." This defendant is advised and insists and so charges, that the consideration for the alleged agreement on the part of Parish was the promise by McGowan to prosecute said claim "to its final determination." This defendant is advised and insists, and so charges, that there was a breach of contract as to this by the said McGowan; that the "determination" to which said McGowan prosecuted it, was a "determination" that it had failed; and it was left to others, having no connection with him, to prosecute said claim to a "determination" that it was a success. That had said defendant known that she could rely on said McGowan to prosecute said claim to a final and successful "determination," under a valid contract with him, it would have been quite agreeable to her to have paid fifteen per cent. instead of what she did pay. But because said McGowan altogether ignored her wishes, interests, and duties and silently abandoned the cause he had agreed to prosecute to "final determination," this defendant resorted to total strangers to take up an abandoned cause; one finally defeated by the judgment of the Secretary to whom by said act of February 17, 1903, it had been referred. Apparently said complainants agreed with the Secretary, that discretion was given to him to decide as he did. Certainly they took no step to assert, still less to demonstrate the contrary. Two years had passed and only one year more remained for any step which could be taken for the assertion of any right which she possessed, when having received no advice, suggestion, or communication even, from said McGowan or said Bookshire, by the advice exclusively of others, she filed the petition for mandamus, which was rewarded finally with complete success; which this defendant is advised and insists and so charges is the only possible step which could have been taken to secure success; but which as

heretofore stated, on information and belief, she avers the complainant Brookshire repeatedly asserted was a remedy which was inapplicable, and which could not be maintained. After the
 22 Secretary of the Treasury had decided, that the act of February 17, 1903, as the opening sentence thereof was drawn, invested him with a discretion which was not open to review; after the complainants, by silence and non action, for two years had acquiesced herein; after the Supreme Court of this District; and the Court of Appeals of this District, had confirmed the judgment of the Secretary; the Supreme Court of the United States finally adjudged that said act was mandatory, and did not clothe the Secretary with judicial but only with ministerial power. For this conclusion, this defendant was indebted in no degree whatever to the complainants or to either of them. She can see no reason to doubt that the one year which remained for the assertion of her rights would have passed in the silence of the preceding years, had she depended on the complainants, or either of them, to take action. She, therefore, reiterates that the said McGowan never gave, and never sought, nor pretended to give the consideration called for by his said alleged contract; that by failing in the important step, of prosecuting said claim "to its final determination," he disentitled himself to compensation for prior professional services under his said alleged contract, if such were rendered; he is not entitled to anything for the final prosecution of a claim, which he did not prosecute "to its final determination", least of all is he entitled on account of the recovery by others in a suit, which he, himself, had tacitly abandoned.

And now having fully answered, this defendant prays to be hence dismissed, with her reasonable costs in this behalf incurred.

EMILY E. PARISH,

Executrix of Joseph W. Parish, Deceased.

I do solemnly swear that I have read the answer by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and the facts therein stated upon information and belief, I believe to be true.

Replication.

Filed October 15, 1909.

* * * * *

The plaintiffs hereby join issue with the defendant.

NATH'L WILSON &
 CLARENCE R. WILSON,
 J. J. DARLINGTON,

Solicitors for Plaintiffs.

Testimony for Plaintiffs.

Filed November 30, 1910.

In the Supreme Court of the District of Columbia, Holding an
Equity Court.

No. 28561.

JONAS H. MCGOWAN, ELIJAH V. BROOKSHIRE, Plaintiffs,

vs.

EMILY E. PARISH, Executrix, et al., Defendants.

Be it remembered, that at an examination of witnesses begun and held on the 18th day of February, 1910, and at other times agreeably to adjournments hereinafter noted, personally appeared before me, Enoch L. White, an Examiner in Chancery of said Court, the within named Ellwood P. Morey, Grant Parish, Elijah V. Brookshire, A. Ralph Serven, R. Golden Donaldson and Jesse E. Potbury, who being produced as witnesses of lawful age for and on behalf of the plaintiffs herein and being first duly sworn and cautioned to tell the truth, the whole truth and nothing but the truth touching the matters at issue in the said above entitled cause, did depose and say as follows:

* * * * *

WASHINGTON, D. C., February 18, 1910.

Met pursuant to notice, at 10:30 o'clock, a. m., at the offices of Messrs. Nathaniel and Clarence R. Wilson, in the Pacific Building, in the City of Washington, District of Columbia.

Present on behalf of the plaintiff McGowan, Messrs. Nathaniel and Clarence R. Wilson.

Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Mr. Holmes Conrad and Mr. Leigh Robinson.

Whereupon, the further taking of these depositions was adjourned, subject to notice.

E. L. WHITE,
Examiner in Chancery.

* * * * *

WASHINGTON, D. C., Saturday, March 19, 1910—

10 o'clock a. m.

Met, pursuant to agreement, at the office of Nathaniel Wilson, Esq., and Clarence R. Wilson, Esq., in the Pacific Building.

Present on behalf of the plaintiff McGowan, Messrs. Nathaniel Wilson and Clarence R. Wilson.

24 Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Present, also, the defendant Emily E. Parish and Grant Parish.

ELLWOOD P. MOREY, a witness of lawful age, produced by and on behalf of the plaintiffs and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. NATHANIEL WILSON:

Q. Please state your full name, residence and occupation.

A. Ellwood P. Morey; 1717 Willard Street, northwest, in this city. Occupation, attorney at law.

Q. When were you admitted to the bar of this District?

A. In the year 1900.

Q. Where were you first admitted to the bar and when?

A. I was admitted to the bar of the Supreme Court of California in 1892—January, 1892.

Q. Are you a member of the bar of the Supreme Court?

A. I am.

Q. When were you admitted to that bar?

A. Well I could not state exactly the year. As my memory now serves me, it was either in 1903 or 1904. I have my certificate which speaks for itself, but I haven't it here. I did not think about being asked that question.

Q. In the summer of 1900, where was your residence and what was your occupation?

A. I resided in this city at 201 Seaton Street, northwest, in Eckington. My office was at 1331 F Street, northwest, this city.

Q. What year was that?

A. The summer of 1900.

Q. Were you acquainted with Mr. Joseph W. Parish?

A. I first met him in the summer of 1900.

Q. Were you acquainted at that time with Mr. Brookshire who is one of the parties to this suit?

A. I was. In fact, I had an office with him at 1331 F Street.

Q. State if you were present at a conference or interview between Mr. Parish and Mr. Brookshire in the summer of 1900?

A. I was.

Q. Where was that?

A. At 1331 F Street, northwest, in this city.

Q. State as near as you can the date of the conference.

A. Well, I do not recall the exact date. To the best of my recollection it was perhaps in August—the latter part of July or the first of August of 1900.

Q. Where was it?

A. At 1331 F Street.

Q. Will you state what occurred. What was said at that conference or interview by Mr. Brookshire and Mr. Parish with respect to any claim which he then had pending in Congress.

25 Mr. CONRAD: That is excepted to by the defendants because it appears there was a contract in writing between Mr. Parish and Mr. Brookshire, which must embrace and conclude all previous negotiations between them.

A. The question of Mr. Parish's claim for a balance due on *on* ice contract was discussed with special reference to the employment of Mr. Brookshire to assist in the prosecution of the case. Mr. Parish had stated at that time that Mr. Brookshire's employment would be subject to the approval of Mr. McGowan who was the senior counsel in the case. It was also stated by Mr. Parish that he would be very glad to have Mr. Brookshire in the case provided Mr. McGowan approved the same. Arrangements were made for a conference with Mr. McGowan later on.

Mr. CONRAD: I want to except now to the answer. The objection noted to the question is here renewed as to the answer of the witness.

Mr. DARLINGTON: In the economy of time and in order to save encumbering the record, it is agreed that this objection shall apply to all the testimony along this line.

A. (Continuing:) Mr. Parish stated that Mr. McGowan had been his attorney for a number of years, and had been in this particular case and that new counsel coming into the case would be subject to Mr. McGowan's approval.

By Mr. NATHANIEL WILSON:

Q. What was the claim that was the subject of that conversation, and where was the claim pending?

A. It was then pending in Congress. I think a bill had perhaps been reported in the Senate and in the House in respect to the claim.

Q. I ask what was the claim. What was the subject of the claim?

A. Well, it was for a balance due on a contract for ice to be supplied to the Army by Mr. Parish, in the Mississippi Valley.

Q. What if anything was agreed upon, or agreed upon tentatively, at that time in the interview between Mr. Parish and Mr. Brookshire?

A. That Mr. Brookshire be employed in the case, to assist in its prosecution.

Q. After that conference, what was then done, within your own personal knowledge, by Mr. Brookshire in reference to the claim?

A. I know Mr. Brookshire—well, it may have been two or three or four months after—reported to me that he had had an interview with Mr. McGowan.

Q. I am speaking now of what you know of your own personal knowledge.

A. Well, Mr. Parish would come to the office from time to time and discuss his claim, with Mr. Brookshire, and he brought in data bearing on the claim in order that Mr. Brookshire might thoroughly familiarize himself with it. I know that Mr. Brookshire was engaged in familiarizing himself with the case.

Q. Can you state how and in what way, of your own personal knowledge, Mr. Brookshire made this preparation?

26 A. In going over the record of the case which had been made in the Court of Claims—a record consisting of something over three hundred pages. He went over that in order to familiarize himself with the facts in the case.

Q. What was the condition of the claim? What was its predicament at that time, and where was it pending?

A. I think a bill had at that time been reported in the Senate and also in the House. That, as I recall it now, was during *during* the Session of the 56th Congress. But no action was taken by the House during the 56th Congress on the claim.

Q. State where it was then pending. Before what committee was the bill then pending?

A. As I recall now, the bill was out of the committee and was in a position to be considered by the whole House if the time could have been given to its consideration.

Q. State what you know of your own personal knowledge as to the next thing done, or service rendered, by Mr. Brookshire?

A. Well, Mr. Brookshire appeared before the sub-committee of the Committee on Claims, which had this particular bill in charge. The testimony which had been taken in the Court of Claims was carefully briefed, to be able readily to show the Committee the facts in reference to the particular questions which they might ask or raise as objections to the claim. The testimony was all gone over and briefed with the special object of showing Mr. Parish's preparedness to deliver the ice, and his ability to deliver it. Questions were raised as to his preparedness and as to his ability to have delivered this particular ice. That necessitated an examination of the record in the Court of Claims in order to be able to meet those questions. Then they wanted to have a brief prepared on the law. They raised the question as to whether or not the Behan rule was the rule applicable to the facts of the case. They raised the question of tender, and as I said, wanted Mr. Brookshire to prepare a list of authorities or memorandum as brief to submit to them bearing on these different legal questions. This brief was prepared by Mr. Brookshire in our common office in the Washington Loan and Trust Building. We had moved from 1331 F Street. The brief was submitted to Mr. McGowan and Mr. McGowan carefully considered it, and the brief was filed with this committee. In making their report, the committee embodied this brief in their report verbatim.

Q. When was that brief prepared and before what Committee and what sub-committee was the case then and what, of your own personal knowledge, use was made of it in the actual physical presentation of the case to the sub-committee?

A. Well, it was presented to the sub-committee of the Committee on Claims of the House, and it was prepared—this particular brief was prepared in our office. Just the exact date I cannot recall, but I think along in, maybe, March or April, of 1902.

Q. Have you a copy of that brief?

A. No; I have not.

Q. How was it presented? Was it printed or typewritten?

A. The brief was typewritten and after it left our office it was taken by Mr. Brookshire to Mr. McGowan's office. At least that is what Mr. Brookshire reported to me and Mr. McGowan afterwards stated that he had examined it carefully and requested Mr. Brookshire to file it.

Q. What do you know of your own personal knowledge of the occasions when Mr. Brookshire appeared before the committee, or the sub-committee?

A. Well, I only know that he would leave the office stating that he had an appointment with the sub-committee. I did not accompany him. He would return sometime during the day and detail to me what he had done in the way of argument, and so forth, before the committee.

Mr. CONRAD: I want to note here an exception as to this hearsay.

Mr. NATHANIEL WILSON: That is understood.

Mr. CONRAD: My exception was as to the written contract. Now I want to note an exception to this hearsay testimony.

By Mr. NATHANIEL WILSON:

Q. Do you know the handwriting of Mr. Parish?

A. I do.

Q. What opportunity have you had of knowing it?

A. I have seen him write his name a great many times and have seen a number of letters from him in his own handwriting.

Q. Will you examine the paper now shown you, a copy of which is attached as an exhibit to the bill, and see if you recognize the signature thereto of Mr. Parish (handing witness paper).

Mr. CONRAD: Is that the contract between Mr. Parish and Mr. Brookshire?

Mr. NATHANIEL WILSON: Yes.

A. I do. I recognize it as the signature of J. W. Parish.

Q. Do you know the signature of J. H. McGowan. If so, what opportunity have you had to become acquainted with it?

A. I do. I have seen him sign his name a number of times and I have seen a large amount of his own handwriting.

Q. Is that his signature?

A. No; that is the signature of Mr. Brookshire.

Q. Do you know Mr. Brookshire's handwriting (handing witness paper)?

A. I do. That is Mr. Brookshire's signature.

Mr. NATHANIEL WILSON: I now offer this paper in evidence and ask that it be marked plaintiff's Exhibit M. & B. No. 1.

(The paper so offered was marked as requested and is as follows:)

"For value received and for legal services hereafter rendered and to be rendered by E. V. Brookshire, in the prosecution of my claim against the government of the United States, and which is more particularly described in Senate Bill No. 475 1st Session 57th Congress, I hereby agree to pay to said Brookshire a sum equal to five per

centum of the amount awarded or appropriated for the payment of said claim. This contract to be an order upon the proper officer of the government or any one authorized to disburse said award so appropriated, and it is expressly understood that said Brookshire shall have a lien for the amount due him upon the amount of the said award when the same is made.

28 "In Witness whereof I hereunto set my hand this the 20th day of January, 1903.

J. W. PARISH.

"Said Brookshire agrees to render necessary and proper legal services in the prosecution of the above described claim in the future under the direction of said Joseph W. Parish.

E. V. BROOKSHIRE."

By Mr. NATHANIEL WILSON:

Q. After the presentation of the argument to which you have referred, what occurred in the history of the claim?

A. The claim was acted on in the House. The bill had already passed the Senate. The claim was acted on in the House in February, 1903, and was passed by the House in February, 1903.

Q. The act approved was of that date, you mean? Was that the date of the act?

A. I do not recall the exact date of the act. What I have reference to is the debate on the bill and the passage of the bill by the House, which occurred early in February of 1903.

Q. After the passage of the act, after its approval, what do you know of your own personal knowledge of the services performed by Mr. Brookshire with reference to the claim?

A. After the approval of the act Mr. Brookshire and myself prepared a memorandum which, when completed, we submitted to Mr. McGowan. After making the amendments suggested by him, the memorandum was filed with the Auditor of the Treasury for the War Department along in March, 1903. This memorandum showed the amount which we thought Mr. Parish should receive under this Act and contained briefly our reasons why we considered Mr. Parish was entitled to be reimbursed in the amount stated in this memorandum.

Q. Was that memorandum printed or written?

A. It was taken to Mr. McGowan's office in longhand and was typewritten in his office and was filed with the Auditor, as I have stated, in typewritten form.

Q. Have you a copy of that?

A. I think I have. I think I have the original manuscript in my own handwriting.

Q. About what time was it presented to the Auditor?

A. Some time during the month of March, 1903; perhaps along about the middle of the month. I am not sure about that.

Q. Have you personal knowledge of that?

A. Well, I know it was presented from having examined the

record over there and from having gone over there myself with Mr. McGowan, and, later on, looking after the claim.

Q. You know it was there?

A. I know it was there; yes.

Q. What was then done by Mr. Brookshire in respect to the execution of the Act of Congress?

A. When the matter reached the Treasury Department Mr. McGowan, you might say, handled the matter exclusively before the Auditor. He would go over there from time to time and discuss the matter with the Auditor and with the Law Board.

29 Q. I am inquiring now as to what was done by Mr. Brookshire up to that time.

A. Mr. McGowan would report back to Mr. Brookshire and request that a memorandum be prepared along certain lines and then Mr. Brookshire and myself would prepare the memorandum and submit it to Mr. McGowan. He might enlarge it, or use it just in the form we presented it to him, to meet certain objections raised by the Law Board. They would raise questions—questions were raised by it as to the ability and preparedness of Mr. Parish to deliver the ice, as to the loss of the ice, as to the first cost of the ice and as to the amount of money that he received by disposing of lumber. They raised a great many questions, and we assisted in the preparation of some three or four briefs which were filed before the Auditor by Mr. McGowan.

Q. State as near as you can how many memoranda were prepared by Mr. Brookshire for use before the Treasury officials, while the matter was pending there, and over what period of time those labors extended.

A. Well, I would say that there must have been eight or ten, extending over a period from March to some time in August of 1903. That is, Mr. Brookshire would assist in the preparation. Mr. McGowan would report to us that he desired a memorandum along certain lines (and we would prepare something and submit it to him) which he wished to use in an argument before the Law Board or to file with the Law Board.

Q. Are you familiar with the history of the claim in the Treasury Department?

A. I am.

Q. And the date of the passage of the act?

A. I am.

Q. What was the date of the final action of the Secretary of the Treasury?

A. It was either on the 31st of May, or the 1st of June, 1904.

Q. The following year?

A. Yes. I fix that date from the letter which Mr. Parish brought to me, which he received from the Secretary and which letter I have. It was a letter from the Secretary himself, transmitting a copy of his opinion. This letter, as I recall, is dated June 1st, 1904—the letter from the Secretary.

Q. Up to that date, what continued services were rendered of your own personal knowledge by Mr. Brookshire in respect to the claim?

A. When the Auditor made his finding the case went over to the Treasury Department proper. It was then ordered by the Secretary to be referred to the Comptroller of the Treasury for an advisory opinion. The matter was before the Comptroller of the Treasury until the latter part of November or the early part of December. There were a number of briefs prepared for use before the Comptroller, in the preparation of which Mr. Brookshire assisted, and the manner of our conducting the case before the Comptroller was in this way: Mr. McGowan had seen the Comptroller and had a conference with him about the case and he raised certain objections which occurred to his mind; Mr. McGowan then came to our office and we discussed the same and it was decided that we should prepare a brief to meet those objections; Mr. Brookshire and myself worked on a brief which was handed to Mr. McGowan and he enlarged upon it and a brief of some—I do not recall now—perhaps twenty or thirty pages in typewriting was evolved.

30 A time was set for a hearing before the Comptroller and Mr. McGowan and myself appeared before the Comptroller at this first hearing and were there some two or three hours.

Q. I am going to ask you particularly about Mr. Gowan's services a little later. I am inquiring now as to what you know, of your own personal knowledge, of Mr. McGowan and Mr. Brookshire's services up to the date of the final decision of the Secretary, to which you have referred.

A. He assisted in the preparation of the briefs which were submitted to the Auditor, to the Comptroller and to the Secretary himself, extending over from March, 1903, until January or February, 1904.

Q. These perfected briefs or memoranda were filed, as I understand, in the office of the Treasury before the officials who had the matter in charge?

A. Yes. They were filed with the person who was then considering the matter.

Q. Will you state as much in detail as you can what, after the passage of the act, were the conferences if any held between Mr. Brookshire, Mr. McGowan and Mr. Parish and what was the occasion and how frequent were they?

A. They were of almost daily occurrence. Mr. Parish himself was a daily visitor at our office, as well as at Mr. McGowan's office.

Q. Covering what period?

A. From the time of the passage of the bill until it had been finally disallowed by the Secretary of the Treasury. Mr. McGowan and Mr. Parish would come to our office and we would together, discuss the objections which had been raised by the Law Board, and followed it on down to the Comptroller and the Solicitor. Then we would go to Mr. McGowan's office often, and he would come to our office.

Q. Will you state during that period what attention was given by Mr. Brookshire and Mr. McGowan to the matter of the claim and to the interviews with Mr. Parish, speaking of your own personal knowledge, and the amount of time that was given to obtain, if possible, an execution of the act.

A. Well, there was scarcely a day passed on which they did not give attention to the case in some form or other. Mr. McGowan, of my own personal knowledge, followed the case very closely during the time it was pending before the Auditor, as well as during the time it was before the Comptroller and Solicitor. And as I have said, I know that we have had a very great many conferences in Mr. McGowan's office as well as a large number of conferences in our own office, at many of which Mr. Parish was present, when we would discuss the best way to meet the objections raised by the Law Board and, later on, by the Comptroller and Solicitor. They would bring up matters entirely foreign to the case which had to be met, and it was necessary for us to consult with Mr. Parish. He would have knowledge of facts which the record did not disclose and which would enable us to meet their objections.

Q. During the time you have mentioned, from the summer of 1900 until the rejection of the claim finally by the Secretary of the Treasury—his ruling on the claim—who else appeared as attorneys in the case on behalf of Mr. Parish, except Mr. McGowan
31 and Mr. Brookshire?

A. Mr. Heber J. May appeared before the Comptroller with Mr. McGowan and also appeared before the Secretary of the Treasury.

Q. That was at a very late date?

A. A very late date; yes.

Q. I am speaking now of the beginning.

A. No one to my knowledge excepting Mr. Brookshire and Mr. McGowan.

Q. Mr. May did not appear in the case at all—

A. (Interrupting.) He didn't appear in the case until after it reached the Comptroller's office.

Q. Will you state in respect of the presentation of the argument and so forth to the Treasury Department, or to the officials of the Treasury Department, whether memoranda were prepared and, if so, to what extent, for use in the case, other than those filed in the Treasury in the course of the preparation of the case, and so forth.

A. Well, to the best of my knowledge there must have been twelve or fifteen memoranda prepared for use before the Auditor alone. Now, how many we in fact filed—I think the record discloses three or four before the Auditor proper. Then before the Comptroller some three or four memoranda or briefs were filed with the Comptroller and perhaps a dozen prepared and used in argument, which were not filed. Before the Solicitor two printed briefs were filed—that is, before the Secretary two printed briefs were filed.

Q. You speak of the Solicitor. Was the matter before the Solicitor?

A. The matter was before the Solicitor from early in December, 1903, until in January, 1904.

Q. After the action of the Secretary of the Treasury under the act, what, of your personal knowledge was done by Mr. Brookshire in respect to the further prosecution of the claim or efforts in regard to obtaining its payment?

A. Soon after the Secretary's decision we had a conference at Mr. McGowan's office at which Mr. Brookshire and Mr. McGowan were present—

Q. (Interrupting.) With Mr. Parish?

A. Mr. Parish was not present on that occasion.

Mr. CONRAD: When was that; did you state?

The WITNESS: After the Secretary's decision.

(Continuing:) —and ways and means were disclosed—

Mr. CONRAD: Shall he go into that?

Mr. NATHANIEL WILSON: Just as matters of fact.

The WITNESS: (continuing:) —and ways and means were discussed for the future conduct of the case in the face of the adverse decision of the Secretary.

By Mr. NATHANIEL WILSON;

Q. What if any conclusion was reached?

A. No definite conclusion was reached, as we wanted to consult with Mr. Parish. But the question of mandamus proceedings was discussed—the question of applying to the Secretary for a rehearing was discussed and the question of trying to have the matter referred to the Court of Claims for an advisory opinion.

32 Q. Was that discussion and the opinions that were held about the future conduct of the case communicated to Mr. Parish, and, if so, when?

A. A very few days after that Mr. Parish came in our office—the office of Mr. Brookshire and myself—and we had a talk with him in reference to the further prosecution of the case and suggested to him the talk we had had with Mr. McGowan with reference to the mandamus proceeding and in reference to applying to the Secretary for a rehearing and in reference to referring the case to the Court of Claims. Perhaps within a week after that we had a conference—I cannot recall whether it was at our office or Mr. McGowan's office—when Mr. Parish was present and we were discussing the further prosecution of the case along the lines I have previously indicated. Mr. McGowan was in favor of immediately taking the matter into the local courts and attempting to recover the amount due Mr. Parish by mandamus proceedings.

Q. And what was said by Mr. Parish upon that proposition?

A. Mr. Parish did not have very much to say. He did not give his consent to one thing or another. He went away without having consented to any particular line of action.

Q. When was that, about?

A. That was—this last interview was within a few weeks after the Secretary had decided the case.

Q. When did you see him again after that interview?

A. I saw him, I think, some time in August or September. He left our office at that time—or either Mr. McGowan's office; I would not be sure which—stating that he would like the opinion of some attorney who had had no connection with the case, in reference to the mandamus proceeding. He did not come around to the office—in fact, we sent for him to come, but he did not come. But I think

in August or September he came to our office and handed me an opinion on the question of mandamus.

Mr. CONRAD: When was that, please.

The WITNESS: I think it was some time in August or September; I would not be sure.

By Mr. NATHANIEL WILSON:

Q. Whose opinion was that?

A. It was an opinion by Mr. Potbury.

Mr. CONRAD: Mr. who?

The WITNESS: Mr. Potbury..

By Mr. NATHANIEL WILSON:

Q. Have you a copy of that opinion or paper? Did he give it to you?

A. Mr. Parish gave it to me, but I think it is in Mr. Brookshire's files.

Q. What was said by him at that time?

A. By Mr. Parish?

Q. Yes.

A. He said he would not give his consent to mandamus proceedings at that time and thereafter we found it impossible to have any appointment with him. A letter was written and signed
33 by Mr. McGowan, Mr. Brookshire and myself, to Mr. Parish, requesting him to call.

Mr. CONRAD: Hold on a minute. Is he now stating the contents of the letter?

By Mr. NATHANIEL WILSON:

Q. What was the date of that letter?

A. I am not sure as to the date of it. It was along in the fall of 1904.

Mr. NATHANIEL WILSON: We will now give notice to counsel to produce the letter written to Mr. Parish dated November 18, 1904, signed by Mr. McGowan, Mr. Morey and Mr. Brookshire, in respect to this matter.

Mr. CONRAD: November 18, did you say?

Mr. NATHANIEL WILSON: November 18, 1904.

Mr. CONRAD: That is the letter from them to Mr. Parish?

Mr. NATHANIEL WILSON: Yes; a letter from them to Mr. Parish.

Mr. ROBINSON: We will produce it if you will produce Mr. Parish's reply.

By Mr. NATHANIEL WILSON:

Q. At the first interview to which you have referred, after the decision of the Secretary was made, what if any dissatisfaction or disposition to dispense with your services was exhibited or expressed by Mr. Parish at the first interview with him?

A. He expressed no intention or desire to dispense with our services.

Q. Then, after that and after the other interview to which you have referred, what efforts were made by Mr. Brookshire and Mr. McGowan, of your knowledge, to see and communicate with Mr. Parish?

A. Well, I do not personally know what Mr. McGowan did any further than what he told me. I know that I made appointments with Mr. Parish myself at our office and he would not keep them. I would go to places where he was in the habit of going and leave word for him to call, and went out to his house and left word with his daughter for him——

Mr. CONRAD: This lady (indicating):

The WITNESS: Yes.

A. (Continuing:) ——to call at our office. That was at the request of Mr. McGowan and Mr. Brookshire. We were endeavoring to have a conference with him for the purpose of taking definite action with reference to the further prosecution of the claim.

By Mr. NATHANIEL WILSON:

Q. And you had no further personal interview with him after that?

A. I think the last time I saw him to talk with him was within a few days after he brought in Mr. Potbury's opinion.

Q. And the date of that you do not recollect?

A. I do not recollect the date just now, but it may have been in August?

34 Mr. DARLINGTON: The letter will show, I guess.

By Mr. NATHANIEL WILSON:

Q. Will you examine the paper now shown to you and state if you recognize it as being the paper handed to you by Mr. Parish and signed by Mr. Potbury, to which you have just referred, dated August 9, 1904 (handing witness paper).

A. (After examination.) Yes, sir. That is the letter which Mr. Parish brought to my office.

Q. And left with you?

A. And left with me.

Mr. NATHANIEL WILSON: We now offer this in evidence and ask that it be marked Plaintiff's Exhibit M. & B. No. 2.

Mr. DARLINGTON: I would suggest that it be copied right into the record.

Mr. CONRAD: Yes; we consent to that.

(The paper so offered was marked as requested and is as follows:)

* * * * *

By Mr. NATHANIEL WILSON:

Q. Do you remember of having addressed a communication to Mr. Parish after the date of this letter, dated November 18? I will ask you to examine the paper now shown you and state if that is a copy of the letter. The original would be in the possession of the defendants (handing witness paper).

A. (After examination.) Yes; that is a copy of the letter which we addressed to him dated November 19.

Mr. CONRAD: Please let me look at that a moment. I will produce the original Friday.

Mr. DARLINGTON: We can let the copy go in now and then when you produce the original any corrections may be made in the record if it is found necessary.

Mr. CONRAD: Yes; it is agreed that the copy may go in at this time.

(The paper so produced is marked "Plaintiffs' Exhibit M. & B. No. 3," and is as follows:)

NOVEMBER 19, 1904.

"Mr. J. W. Parish, 217 A St. S. E., City.

"DEAR SIR: We have done what we could to secure an interview with you concerning the Ice Claim. You have deliberately advoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next, we shall proceed as we deem best under the ample authority which we have.

Yours truly,

J. H. MCGOWAN.

E. P. MOREY.

E. V. BROOKSHIRE."

By Mr. NATHANIEL WILSON:

Q. Was a reply received to that letter?

A. There was.

Q. Have you the original of it?

A. I think it was delivered to you.

35 Mr. NATHANIEL WILSON: I have a copy here; I do not know that it is the original.

Mr. CONRAD: This is the copy of Mr. Parish's reply? You ought to have the copy in Mr. Parish's own handwriting.

Mr. NATHANIEL WILSON: I cannot lay my hands on the original just now, but I suppose you will agree that the copy go in at this time and when the original is produced it may be submitted for the copy.

Mr. CONRAD: Yes.

(The paper so produced is marked "Plaintiffs' Exhibit M. & B. No. 4," and is as follows:)

WASHINGTON, D. C., Nov. 22, 1904.

GENTLEMEN: Your imprudent and discourteous letter of the 19th instant, received yesterday. Contents noted.

"I hereby give you notice that I will not submit to any such 'Bulldozing' methods as you propose in your letter.

"You gentlemen failed to materialize your wonderful talent to get Mr. Shaw to pay my claim. There is no evidence that your ability and knowledge has improved it in any way. Your letter shows a spirit of imaginary resentment, and should you proceed to carry out your infamous threats, you will be met by a competent repre-

sentative, who will no doubt advise you to go slow for the next year or two.

Yours truly,

J. W. PARISH.

To Messrs. J. H. McGowan, E. P. Morey, E. V. Brookshire."

By Mr. NATHANIEL WILSON:

Q. After the receipt of the letter from Mr. Parish which has just been given in evidence, what was done to your knowledge by Mr. Brookshire and Mr. McGowan in respect of the claim and its prosecution?

A. There was nothing done. This was in the latter part of November when the reply was received and Mr. Parish died within a month or so after that—I think he died on the 26th of December following:

Q. Between the date of that letter and the date of his death, did you have any interview with him so far as you know?

A. None so far as I know.

Q. In the meantime, did you have any connection with any of his relatives or family?

A. None to my knowledge; not between the date of this letter and the date of his death.

Q. Not between the date of this letter and the date of his death. Where did he die?

A. He died at his home on A Street—217 A Street, I think, southeast.

Q. After the death of Mr. Parish what, if any, connection or interviews did you have with Miss Parish, his daughter?

A. I had no connection with her.

Q. Did you have any interviews with her?

A. No. Shortly after the death of Mr. Parish I met R. 36 Golden Donaldson of the firm of Cole & Donaldson on the street, and he informed me that his firm had been retained by Miss Parish, as Executrix, and stated that he would like to have a conference between Mr. McGowan, Mr. Brookshire and myself and his firm looking to our location in the case. He suggested that we write a letter to his firm asking for an appointment and stated that an appointment would be arranged when we would have a conference and arrange for ourselves in the case in connection with its further prosecution. At his suggestion, a letter was written and signed by Mr. McGowan, Mr. Brookshire and myself and sent to Messrs. Cole & Donaldson. We received no reply to that letter. Mr. Cole, shortly after that, became ill and died. I do not recall the date of his death now, but it was within a short time after we had written—his sickness and death was within a short time after we wrote the letter.

Q. What do you know of the circumstances attending or preceding the employment of Cole & Donaldson?

A. How is that?

Q. What do you know of the circumstances under which Cole &

Donaldson were employed? When was it that their names were first mentioned?

A. Their names were first mentioned to Mr. Parish by myself.

Mr. CONRAD: Did you mention the date? If you did, I did not catch it. When was the time you met Mr. Donaldson on the street?

The WITNESS: That was after Mr. Parish's death and after Miss Parish had qualified as executrix.

By Mr. NATHANIEL WILSON:

Q. I am now asking what occurred before Mr. Parish's death.

A. Well, shortly after Mr. Parish brought in Mr. Potbury's letter he said he would like to have the opinion of Mr. Darlington, and I went to Mr. Darlington's office with Mr. Potbury to see him with reference to mandamus proceedings.

Q. At the request of Mr. Parish?

A. Yes. At the request of Mr. Parish; Mr. J. W. Parish. Mr. Darlington, as I recall now, stated that he was very busy and did not see how he could give the case the attention that it required and recommended that we see the firm of Cole & Donaldson. That is as I remember it. Then I reported that fact, perhaps the same day, to Mr. Parish at my office.

Q. Then what did he say? What was done, if you know?

A. That was about the last time I saw him.

Q. About what time was it?

A. Well, as I recall now, it was sometime in the latter part of August, 1904.

Q. Do you know of your own knowledge what if any papers were sent to Cole & Donaldson?

A. No. You mean——

Q. From you or Mr. Parish.

A. I know nothing about that. The only thing we sent to Messrs. Cole & Donaldson was our letter asking for a conference.

Q. And that was after Mr. Parish's death?

A. That was after Mr. Parish's death and at the suggestion of Mr. Donaldson.

Q. Now, after the death of Mr. Parish, you were speaking
37 of the interviews that you had, or of the interview you had, with Miss Parish, the Executrix. When did that take place?

A. That was before Mr. Parish's death.

Q. Did you see her afterwards?

A. No.

Q. What if any communication did you receive from Miss Parish after her father's death?

A. I received no communication.

Q. What if any notification or expression of any purpose in regard to the claim did you receive from her, verbal or otherwise, after his death?

A. Nothing, to my knowledge. I received nothing.

Q. Within your knowledge, what refusal or expression or decision of unwillingness on the part of Mr. Brookshire or Mr. McGowan did you ever have any knowledge of personally, as to con-

tinuing the prosecution of the case or continuing their services in the case?

A. They were ready and willing and anxious. But Mr. Parish, as I have stated, evaded them.

Q. Within your own personal knowledge, what knowledge had Miss Parish of the engagement and of the services of Mr. Brookshire and Mr. McGowan in the case?

A. She had been in Mr. McGowan's office. She was in receipt of money from Mr. McGowan, and she knew that Mr. Brookshire was employed—

Q. (Interrupting:) How do you know that? Just state what your own personal knowledge of these matters is.

A. Mr. Brookshire, of my own knowledge, went to her house—

Mr. CONRAD: Of your knowledge?

The WITNESS: Of my knowledge; I went with him.

A. (Continuing:) —to consult with Mr. Parish about the case. As I remember now, Miss Parish received us at the door—as I recall it now.

By Mr. NATHANIEL WILSON:

Q. When was that, about?

A. Well, that was during the time the case was pending in the Treasury Department. She knew that Mr. Brookshire was connected with the case, because I had a talk with her myself about the case, especially when it was before the Auditor.

Mr. CONRAD: You had a talk with her?

The WITNESS: Yes.

By NATHANIEL WILSON:

Q. Where were those conversations held?

A. The principal conversations I had with her in reference to the case were at Harpers Ferry.

Q. When?

A. In 1903—in the summer of 1903.

Q. What was the occasion of your going there?

A. I took Mr. Parish to Harpers Ferry and he was anxious to have his daughter there with him. He thought he would stay there and he sent for her and she came up while I was there and we were out driving. We stopped at the Hill Top House, at Harpers Ferry. The case was discussed while we were out driving. It was a frequent matter of discussion.

Q. How long were Mr. Parish and Miss Parish at Harpers Ferry?

38 A. I think Mr. Parish was there two weeks; maybe a little longer.

Q. After the act was passed, was Mr. Parish here continuously or was he absent a part of the time?

A. He was absent part of the time.

Q. Where?

A. At Ocean Grove.

Q. Was there any other absence for a continued time?

A. I do not recall during the time the case was pending in the Treasury Department. After his return from Harpers Ferry and within a short time he went to Ocean Grove and remained there a few months.

Q. A few months?

A. Just exactly how long it was, I cannot tell you now. I could look it up. That was the summer of 1903 or the fall of 1903, as I now recall it.

Q. I have inquired of you about the services rendered within your own knowledge by Mr. Brookshire. Will you now state what you know of the services that were actually rendered by Mr. McGowan after the date of the passage of the act?

A. Well, I know that Mr. McGowan prepared a number of memoranda, because we discussed them together—he read them to me and sometime she would join what he had with what I would submit to him. I know that he appeared before the Auditor and the Law Board, because I went with him at times——

Q. Let me ask you if you will state chronologically what was done in the Treasury, after the passage of the act, in respect of its execution and what were the successive stages through which it went and what was done by Mr. McGowan of your own personal knowledge there in the Treasury—before the Treasury officials. Follow each step that was taken in connection with the claim from the time of the passage of the act.

A. Well, I accompanied Mr. McGowan on perhaps two or three occasions over to the Auditor's office.

Q. Just state in regard to the claim, where it went, after the act was approved. What was done first, if you know?

A. After the act was approved it was referred to the Auditor of the Treasury for the War Department.

Q. By whom?

A. By the Secretary. The memorandum was prepared which was mentioned and enlarged by Mr. McGowan, and filed with the Auditor.

Q. Who was the auditor then?

A. I think it was a Mr. Rittman. It was referred by him to what they call the Law Board—the Law Board of the auditor's office.

Q. The auditor's office?

A. Of the auditor's office.

Q. Who composed the law board?

A. It consisted of three lawyers—I cannot recall their names now. Mr. Kern was one. I did know their names but I cannot recall them now.

Q. Where did it go then?

A. From there—after the Auditor made his finding——

Q. (Interrupting.) Did the Law Board make a report to the Auditor?

A. The Law Board made a report. The Law Board found that there was so much due——

Q. They made a report?

A. Yes.

Q. Then, what?

39 A. The Auditor sent to Mr. Parish, in care of Mr. McGowan, a statement to the effect that he had examined his claim and found a balance due him of one hundred and eighty one thousand and some odd dollars and that a warrant would issue in due course, or forthwith—I do not remember exactly, but it was to that effect. That was originally sent to Mr. McGowan—sent to Mr. Parish in care of Mr. McGowan—and Mr. Parish brought it to our office and handed it to me.

Q. Have you got it?

A. I haven't it. Mr. Parish afterwards carried it away.

Q. He brought it to you, and these were the figures that are in the record.

A. Yes; one hundred eighty thousand and some odd dollars.

Q. Now, after that?

A. From the Auditor's office it was sent to the Warrant Division of the Treasury Department and the Secretary took hold of the matter and referred it to the Comptroller of the Treasury for an advisory opinion.

Q. Who was the Comptroller?

A. Mr. Tracewell. After he was through with it, the Secretary referred it to the Solicitor.

Q. After he was through with it—did he report it back, or what did he do?

A. He rendered an advisory opinion in which he stated there was nothing due.

Q. And that went to the Secretary?

A. That went to the Secretary, and then the Secretary referred it to the Solicitor for his opinion. The Solicitor also found that there was nothing due Mr. Parish and that is the report he made to the Secretary of the Treasury. Then the Secretary took the matter up himself and decided the case on the 31st of May, or the latter part of May or first of June.

Q. He made the decision which is also in the record and which there is no dispute about now, in respect of what was done. You have stated with reference to Mr. Brookshire with respect to what was done after the warrant got to the Secretary. State what was done by Mr. McGowan, whether he appeared before these tribunals or officials, and what was done by him; the labor to prove his contention which he gave to it to your knowledge, and what he did in the way of arguments, and briefs, and so forth.

A. Mr. McGowan to my knowledge prepared a number of briefs and I appeared with him before the Comptroller on three or four different occasions when we would be there as much as two or three or four hours at a time, arguing the matter. The first time we appeared together we had a brief I think, consisting of maybe twenty or thirty pages or even more.

Q. The first thing, it went to the Auditor did it not?

A. Yes. I thought I had stated that.

Q. I want you to state definitely with respect to each step, after it went to the Secretary the first time. What was done before the Auditor and Law Board?

A. Mr. McGowan, to my knowledge, prepared briefs to be filed before the Auditor or the Law Board and, to my personal knowledge, appeared before them three or four times when I accompanied him. I suppose he prepared or assisted in the preparation of at least ten or twelve briefs to be filed or used before or with the Law Board.

40 Q. Then, the next thing after it got back to the Auditor was the Auditor's findings and then the reference to the Comptroller?

A. Yes.

Q. What occurred there?

A. After it reached the Comptroller's office we prepared a brief, after we had had an intimation from the Comptroller that he was opposed to the payment of the claim. Mr. McGowan reported to me that he had seen the Comptroller and that he was adverse, and then, within a day or two, I called on the Comptroller myself and had an extended interview with him in reference to his objection; and I returned to Mr. McGowan's office and dictated to his stenographer, as well as I could remember, what objections Mr. Tracewell raised to the claim. With that memorandum and with what Mr. McGowan had learned, we set about the preparation of a brief to go before the Comptroller for argument, and did prepare a brief and did appear before Mr. Tracewell. The first time we were there together, we were there perhaps two and a half or three hours. Mr. Tracewell did not only make the objections which had been met before the Committee, but also objections which were raised by the Law Board and others besides. We went away, in reality not satisfied with his frame of mind, and arranged for further hearings. At the next hearing Mr. May, to whom I have referred, was present.

Q. What hearing was that?

A. The next hearing we had with the Comptroller—Mr. May was present.

Q. Before the Comptroller?

A. Yes.

Q. That is his first appearance in the case?

A. That was Mr. May's first appearance.

Q. And then what?

A. Well, we prepared—when Mr. May was present we had a brief which we submitted. After that we appeared before the Comptroller again and filed some briefs with him. Then he reported his findings.

Q. Then what happened?

A. Then it was referred by the Secretary to the Solicitor. What was done before the Solicitor I do not know. I did not appear before him.

Q. You haven't any personal knowledge of it?

A. No.

Q. You have already stated how long it was pending there. Then it came on back—

A. Then it came on back to the Secretary. Then Mr. McGowan arranged with the Secretary to have an oral argument and for the privilege of filing briefs.

Q. Describe in detail just what occurred before the Secretary, and about when it was.

A. It was in February, 1904. Mr. McGowan was present, Mr. May was present, I was present, the Solicitor of the Treasury was present and the Comptroller of the Treasury was present, as well, of course, as the Secretary. We appeared there with two printed briefs—

Q. In the Secretary's room?

A. In the Secretary's private office.

Q. And had a formal hearing?

A. And had a formal hearing, at which Mr. McGowan presented the case, and made an extensive oral argument going into the facts and the law of the case very thoroughly. We took with us a number of law books and I think the hearing lasted three hours.

41 Q. And who else participated in the discussion?

A. Well, you might say nobody excepting Mr. McGowan. Mr. May might have said a word or two, and I might have said a word or two occasionally, but McGowan had the floor the greater part of the time. Then it was a discussion back and forth between Mr. McGowan and the Secretary and the Solicitor and the Comptroller. They would raise objections. They had their own opinions there. The Solicitor had his opinion which he had written, and would read from that, and we had a very lively time.

Q. State who appeared for the United States, or against the claim, in that discussion, and how the discussion was conducted.

A. The Solicitor of the Treasury and the Comptroller were both there opposing the payment of the claim, or rather the payment of the amount found due by the Auditor.

Q. They having already given their opinions?

A. They having already filed their opinions. And the briefs which we filed were in response to the Comptroller's opinion and the Solicitor's opinion.

Q. And that hearing was concluded the same day?

A. The hearing was concluded the same day.

Q. And were any briefs filed after that?

A. No briefs were filed after that.

Q. Then followed the decision?

A. The decision followed then in two or three months after that.

Q. What occurred in the meantime, if anything?

A. We were simply lying on our oars waiting for the decision.

Q. You just waited?

A. Yes; just waited. We went away from the Secretary's office feeling we would get a favorable decision.

Q. What do you know, of your own personal knowledge, of Mr. McGowan's connection with the case before the act was passed?

A. Only what Mr. Parish told me and what Mr. McGowan told me.

Mr. ROBINSON: That would be objected to—what Mr. Parish told him.

By Mr. NATHANIEL WILSON:

Q. I am speaking now of the time that preceded the passage of the act.

A. Why, Mr. Parish told me himself that Mr. McGowan had been his attorney for a number of years.

Q. Did he state how long?

A. Why, ten or fifteen years. That he had been with him in the Treasury Department before, when he got some \$58,000 I think, out of this same claim.

Q. And what he did after the employment of Mr. Brookshire, you have already stated?

A. Yes. That was prior to the act.

Q. You have stated that you know Mr. McGowan's signature. Will you examine the paper now shown you and state if you recognize the signature of Mr. Parish and Mr. McGowan. This is the original contract. (Handing witness paper.)

A. (After examining paper.) I do. I identify the signature of Joseph W. Parish and that of J. H. McGowan.

42 Mr. NATHANIEL WILSON: I now offer in evidence the original contract which had been identified by the witness, signed by Mr. Parish and Mr. McGowan, and ask that it be marked Exhibit M. & B. No. 5.

(The paper so offered in evidence was marked as requested and is as follows:)

* * * * *

(Thereupon, at 12 o'clock, noon, a recess was taken until 1:30 o'clock, P. M.)

After Recess.

ELLWOOD P. MOREY, a witness heretofore sworn, resumed the stand for further direct examination.

By Mr. NATHANIEL WILSON:

Q. Will you examine the paper now shown you, purporting to be signed by Mr. J. H. McGowan, and state if you identify the signature of Mr. McGowan thereto (handing witness paper)?

Mr. CONRAD: What is that?

Mr. NATHANIEL WILSON: That is the agreement between Mr. McGowan and Mr. Brookshire.

A. I identify the signature to be that of J. H. McGowan.

Mr. NATHANIEL WILSON: I now offer this in evidence and ask that it be marked "Plaintiffs' Exhibit M. & B. No. 6."

Mr. DARLINGTON: You gentlemen, I presume, will waive proof of Mr. McGowan's signature by the witness to the paper?

Mr. CONRAD: Oh yes.

(The paper so offered in evidence was marked as requested and is as follows:)

* * * * *

By Mr. NATHANIEL WILSON:

Q. After the date of that paper, which is dated in December, 1902, what personal knowledge had Miss Parish of the services rendered by Mr. Brookshire and Mr. McGowan, as far as you know?

A. I believe I stated that we discussed the services rendered by Mr. McGowan and Mr. Brookshire in Miss Parish's presence at the Hill Top House, at Harpers Ferry.

Q. Is that the first time?

A. I think that was the first time that we ever discussed the services—that is the scope of the work that was performed. Then, after that, Miss Parish and her father were——

Q. What was the date of that with reference to the Secretary's decision?

A. That was before the Secretary's decision.

Mr. DARLINGTON: After the Auditor's decision.

The WITNESS: No. I think that was shortly before the Auditor's decision.

43 A. (Continuing:) Then Miss Parish and her father were at Ocean Grove and I went to Ocean Grove to see Mr. Parish and Miss Parish and we again discussed the case in her presence, and Mr. McGowan's name was particularly mentioned in view of the fact that he had recently been to Ocean Grove to see Mr. Parish and his daughter a short time previous to my arrival there.

Q. What time was that with reference to the decision of the Secretary of the Treasury?

A. That was before.

Q. Before his decision?

A. Before his decision; yes. That was perhaps in the late summer.

Q. Of what year?

A. 1903.

Q. 1903?

A. Yes.

Q. Was there any other interview or discussion?

A. I do not recall any other interview or discussion except when I called at the home of Miss Parish, perhaps in October, 1904, having gone there at the request of Mr. McGowan to see if it were not possible to make an appointment with Mr. Parish for a consultation in reference to the further conduct of his case. Miss Parish came to the door and I stated to her the object of my visit and that it was very important that Mr. Parish should come down to Mr. McGowan's office or our office and make a definite arrangement about going ahead with the case; that the time was running on and that we were very anxious to go on with the prosecution of the case. Her father was not in, and she stated she did not know when he was in or where I could find him. I left word with her to tell her father to come to Mr. McGowan's office or to our office.

Q. And that was when?

A. That was, to the best of my recollection now, sometime in October.

Q. Of what year?

A. 1904.

Q. After the decision?

A. After the decision of the Secretary. Mr. Parish did not call either at Mr. McGowan's office or at our office, and later on we write him a letter signed by the three of us which, I believe, is dated November 19.

Q. Will you state what, if any, discussion, there was before the Secretary's decision in regard to a remedy, or any discussion at that time with Miss Parish as to the remedy or other means of enforcing the act by other proceedings?

A. Well, I do not recall of having discussed any particular remedy.

Q. When was the first mention made, so far as you know, to Miss Parish in respect—

Mr. CONRAD: With whom?

Mr. NATHANIEL WILSON: With himself.

By Mr. NATHANIEL WILSON:

Q. (Continuing:) —in respect to the remedy of mandamus?

A. Well, I do not recall myself of having said anything in reference to mandamus to her directly. But at this interview which I had with her in October, 1904, I stated to her that it was very important that we should take some action in connection with the case. Whether I stated mandamus proceedings or other proceedings, naming them, I do not recall.

44 Q. What personal knowledge had you of any abandonment or expression or a desire or willingness to abandon the case—to cease its prosecution—or continue their efforts for the collection of the money found due by the Auditor, on the part of Mr. Brookshire or Mr. McGowan?

A. I have no knowledge of their intention to abandon the case. But I do know, on the contrary, that they were at all times anxious to proceed with the case and endeavored at different times and in different ways to have interviews with Mr. Parish for the purpose of proceeding with the further prosecution of the case. Even after the death of Mr. Parish a letter was addressed to Messrs. Cole & Donaldson who were her attorneys of record, offering our services.

Q. When was that? What was the date of that?

A. That was perhaps in January, 1905. I have a copy of the letter, which will give the exact date.

Cross-examination.

By Mr. CONRAD:

Q. Mr. Morey, have you any pecuniary interest in the result of this case?

A. I have an arrangement with Mr. Brookshire.

Q. What is the nature of that arrangement? How much are you to be paid, in the first place?

A. He assigns to me one-half of whatever fee he receives.

Q. Has he assigned it to you?

A. He has.

Q. In writing?

A. He has.

Q. Have you got it?

A. I have it in my possession.

Q. Will you produce it?

A. I will, if my attorneys so instruct.

Mr. CONRAD: I presume you have no objection to producing this contract.

By Mr. CONRAD:

Q. Was that with the knowledge of Mr. McGowan?

A. I could not say positively. I imagine so.

Mr. DARLINGTON: I object to what he imagines.

Mr. CONRAD: Oh, yes. I am very much afraid of imagination: I would rather have memory.

By Mr. CONRAD:

Q. Did Mr. McGowan recognize you as one of the attorneys in this case?

A. Well, he recognized the work that I did in the case.

Q. Did you ever present yourself to him in person or by written communication as one of the attorneys in this case?

A. I did not.

Q. You are perfectly clear about that?

A. I feel perfectly clear about that.

Q. You state that under oath?

A. Yes.

Q. You have given thorough examination and consideration to the subject matter of your testimony before you went upon the stand?

A. I think I knew what I was testifying about.

45 Q. Did you sign that letter written to him on the 19th of November?

Mr. DARLINGTON: Written to whom?

Mr. CONRAD: Written to Mr. Parish.

By Mr. CONRAD:

Q. Did you sign that letter to Mr. Parish?

A. I did, sir.

Q. Had Mr. Parish at any time known you as one of the attorneys in the case?

A. Mr. Parish was cognizant of what I was doing in the case.

Q. Did he know of the contract between you and Mr. Brookshire?

A. That I do not know.

Q. Did Mr. Parish recognize you as one of the attorneys in this case?

Mr. DARLINGTON: I object to that as calling for an opinion or the conclusion of the witness. I have no objection to counsel showing what Parish did.

By Mr. CONRAD:

Q. You say that Parish recognized you as one of the attorneys in this case?

A. I had no formal recognition from him as an attorney in the case?

Q. In what character then were you in conference and consultation with him?

Mr. DARLINGTON: I repeat my objection as calling for a conclusion, or the deductions of the witness. I submit to counsel that the proper form of interrogation should be what took place between Mr. Parish and Mr. Morey.

Mr. CONRAD: Please read my question.

(The question was read by the stenographer as follows:)

“Q. In what character then were you in conference and consultation with him?”

By Mr. CONRAD:

Q. In what character were you—how did you hold yourself out in your conferences and consultations with Mr. Parish?

A. Well, at those conferences I would be present either at the request of Mr. Brookshire or Mr. McGowan and would act as an attorney.

Q. Do you know whether Mr. Parish knew that you were to receive compensation for your services, contingent upon a recovery?

A. I do not know positively about that. I could not answer that yes, and I would not like to answer no.

Q. But you have that interest in this recovery?

A. I have.

Mr. CONRAD: At this stage, it just now appearing for the first time that the witness has an interest in a recovery in this suit, under a contract with Mr. Brookshire, the testimony given by him up to this time is excepted to on the ground of his incompetency to state as to any transactions between Mr. Brookshire and Mr. Parish, 46 or Mr. McGowan and Mr. Parish, or himself and Mr. Parish.

We give notice that at the hearing we shall move to strike out all of this testimony. Now, I really must admit that I see very little that calls for a cross-examination. Reversing the order in which the testimony was given, however, there are just one or two matters I would like to clear up.

By Mr. CONRAD:

Q. You say that you found Messrs. Cole & Donaldson were attorneys of record?

A. I did not so state. I said that Mr. Donaldson—

Mr. CONRAD: No sir: pardon me. You said Cole & Donaldson were attorneys of record. I will ask the stenographer to read the answer of the witness at the close of his direct examination, in which he states that Cole & Donaldson were the attorneys of record.

(The portion of the answer referred to was read by the stenographer as follows:)

"A. * * * Even after the death of Mr. Parish a letter was addressed to Messrs. Cole & Donaldson who were her attorneys of record, offering our services."

By Mr. CONRAD:

Q. Now, I ask you if you did not say Cole & Donaldson were the attorneys of record?

A. Yes.

Q. Do you know that to be the fact?

A. I stated that on the statement made to me by Mr. Donaldson himself.

Q. Did he tell you that they were the attorneys of record?

A. He said they had been employed in the case and their appearance had been entered in the Probate Court.

Q. Did Mr. Donaldson state to you directly or indirectly that the firm of Cole & Donaldson ever had been employed in this ice claim?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. And that their appearance had been entered in the ice claim?

A. No; not in the ice claim. When he said that, he had reference to being attorney of record for Miss Parish, as Executrix.

Q. In the Probate proceedings?

A. Yes.

Q. But I asked you whether Cole and Donaldson were the attorneys of record in the prosecution of this ice claim?

A. I did not so understand from Mr. Donaldson.

Q. That is the extent of your information on this subject?

A. It is, sir.

Q. You say that you had a talk with Miss Parish in October, 1904?

A. Yes.

Q. At her house?

A. At her house.

Q. And you stated to her what?

A. That it was very important that a conference should be had with her father about the further prosecution of the claim.

47 Q. Anything else?

A. That Mr. McGowan was anxious to see him, and for him to either come to his office or to our office.

Q. Was that all?

A. Well, that was the subject of the conversation.

Q. As I understand you, that was the subject matter of your conversation, as far as you have indicated?

A. Well, that was about the extent of it.

Q. Where did that conference occur?

A. At her house—Miss Parish's house.

Q. At or in the house?

A. At the front door.

Q. You were not in the house?

A. I didn't go inside.

Q. And it lasted but a few minutes?

A. A very few minutes.

Q. Do you know whether Mr. Parish was out of this city between May 31, 1904, and the time of his death, of your own knowledge?

A. May 31, 1904?

Q. That was the date of Shaw's decision.

A. Not of my own knowledge.

Q. You used an expression in the course of your testimony here that rather jarred. I want to ask you to explain it. You stated that Mr. Parish evaded you gentlemen—"evading" was the word you used.

A. Yes sir.

Q. What warrants you in stating that Parish was evading you?

A. For the reason that he would not keep his appointments. He made appointments with me which he did not keep and he made appointments with Mr. McGowan which he did not keep.

Q. Did you hear him make an appointment with Mr. McGowan?

A. I am stating only what Mr. McGowan said.

Q. You know that is not evidence, as a lawyer.

A. I understand.

Q. Let us get down to what you know.

Mr. DARLINGTON: I submit that he was asked his reasons for using that word, and he has a right to explain.

Mr. CONRAD: I am asking him for his reason; yes.

By Mr. CONRAD:

Q. Now, you say Mr. Parish made an appointment with you which he failed to keep. Please give me the date of such appointment and where it was to be kept?

A. I made appointments through Mr. Rand, I think.

Q. Through Mr. Rand?

A. Through Mr. Rand, to meet me on G Street, at one time.

Q. How did you know he did?

A. Why, Mr. Rand informed me.

Mr. CONRAD: I note an exception to all the foregoing testimony relative to that appointment.

By Mr. CONRAD:

Q. Did he make any other appointment with you?

A. He agreed to come to my office and did not come.

Q. He had an agreement with you?

A. He had an agreement with me.

Q. To do what?

A. To come to the office.

48 Q. When did he make the agreement?

A. Well, I think it was along in September, 1904.

Q. And when did he say he would come?

A. Perhaps the next day.

Q. Did he fix the next day and say "I will be there on the next day?"

A. As far as my memory serves me now, he did.

Q. This is a serious business. We are talking now against a man who is dead. Did that man say to you "I will be up to your office to-morrow?"

A. He said he would be at the office to-morrow or the next day. Whether he said "tomorrow" or "the next day," I do not remember at this date. But that is my best recollection.

Q. And you say he did not come?

A. He did not come.

Q. How do you know he did not come?

A. I waited there for him and he did not come.

Q. You did not go out of your office then for a moment, all day long?

A. I presume I was absent when I went out for lunch, as I usually did.

Q. You would not undertake to swear that he did not call at lunch time; would you?

A. No; I could not.

Q. You could not?

A. I could not.

Q. Then, when you say Mr. Parish promised to call there the next day or the day after, and did not come, what you mean to say is that you did not know of his coming?

A. What I mean to say is that he did not come.

Q. You are still certain of that?

A. I am still certain of that.

Q. Did you see him after that appointment had been made and broken?

A. I do not know that I did.

Q. Did you seek to see him?

A. I did.

Q. Did you write to him and inquire why he did not come?

A. I signed a letter with Mr. McGowan and Mr. Brookshire.

Q. That was the 19th of November. I am talking about October.

A. That is the only minute I have.

Q. You say he had an appointment to meet you "tomorrow or next day." Did you ever write and inquire why he did not keep that appointment?

A. I do not recall that I did. I may have done so.

Q. Did you write to him at all in the fall of 1904?

A. I do not recall now that I did, further than this one letter.

Q. Do you know how Mr. Parish first learned of Secretary Shaw's adverse decision?

A. Only from what he told me. He brought the Secretary's letter in to my office and handed it to me.

Q. That was your first intimation of it?

A. That was the first intimation I had.

Q. You dropped another expression a while ago that made an impression on my mind, and I want to see if it is correct. You said you took Mr. Parish to Harpers Ferry and then you said something about a drive. Did you take a drive with Miss Parish, or she take a drive with you, at Harpers Ferry?

A. As I recall it, she went along with myself and wife and J. W. Parish in a carriage.

Q. And was the subject discussed during that drive?

49 A. The ice claim was the principal topic of conversation up to the Hill Top House.

Q. You were not enjoying the scenery then, and had no other subject of conversation of interest besides the ice claim?

A. We discussed the scenery and the goats up on the mountain side, and the battle fields, and had a very pleasant time driving around and seeing the sights.

Q. How many drives did you take when Miss Parish was present?

A. I do not know that I took more than one.

Q. Now, one more thing. You used another word, and I want to see if you used it in the sense in which I understood it. You said that in Miss Parish's presence you discussed the scope of Mr. McGowan's services rendered to Mr. Parish.

A. Yes.

Q. I wish you would tell me, please, what you mean by discussing the "scope" of the services rendered by Mr. McGowan. Was any question raised by anybody as to the extent or character of those services?

A. No. Mr. Parish was in the habit of talking about Mr. McGowan and always expressed the highest appreciation of what Mr. McGowan had done for him, how long he had been his attorney, how faithful he had been to him, how long he had been in this case and how faithfully he had rendered his services in the Treasury Department. He looked upon Mr. McGowan as his best and truest friend, and that is what I mean by discussing the "scope."

Q. You do not use the word "discussion" in the sense that there were two sets of views being held, one by one side and one by another?

A. Oh, no.

Q. You simply mean that you talked about it.

A. I do not mean in the sense of finding fault or making any criticism.

Q. Then, when you said you were having a discussion, you simply mean that you were talking about it?

A. Yes.

Q. All that occurred in 1903; and after Secretary Shaw's decision, in May, 1904, you have stated in your testimony now all of the conversations that you had, or anybody else had in your presence, with Mr. Parish on this subject, have you?

A. As far as I recall.

Q. Did you ever write to Mr. Parish after Secretary Shaw's decision, on the subject of that decision and on the future course to be pursued?

A. I may have done so; but if I did, I do not recall it now.

Q. Do you know of your own knowledge, not from hearsay, of either Mr. McGowan or Mr. Brookshire's doing so?

A. Nothing further than that letter of November 19.

Q. That was between the time of the adverse decision and the time of Mr. Parish's death, which was the 26th of December, 1904.

You have stated now everything as far as you can remember, that was said or done by you or your associate counsel in this matter with reference to any further action that was taken in the case?

A. As far as I recall, I have stated what I know.

Q. Just one more thing, unless Mr. Robinson has something to ask you. You spoke of a conference being held by the attorneys—

that is, you and Mr. McGowan and Mr. Brookshire—and

50 placed it about a week after Mr. Shaw's decision, at which

Mr. Parish was not present. Then you stated, if I am not mistaken, that a few weeks after Secretary Shaw's decision a conference was held between the same attorneys, at which Mr. Parish was present?

A. I do not think I used the term "few"; but it was shortly after the first conference.

Q. How long after?

A. A few days.

Q. A few days. That is very much better. A few days after the first conference with the attorneys, at which Mr. Parish was not present, you had the other conference at which Mr. Parish was present. At that conference, will you please state again (you will pardon me asking you to repeat it, but I want to get it clear) what further course of action was suggested or considered by you, to be taken in the matter?

A. Primarily, the question of mandamus proceedings.

Q. The mandamus proceedings primarily. And, secondarily?

A. Well, the reference of the case, if it could be had, to the Court of Claims for an advisory opinion, or an application to the Secretary for a rehearing.

Q. And all the attorneys concurred, did they, in that mandamus view? There was no dissent from that view?

A. No; I would not say that all concurred. Mr. McGowan was of the opinion that mandamus would lie. Mr. Brookshire was not so strongly of the opinion. But there was no decision as to whether mandamus proceedings should be instituted, or not, for the reason that it was expected to have a further conference and for the reason that Mr. Parish would not give his O. K. to any proceeding at that time.

Q. He would not consent to any proceeding at all?

A. He did not, at that time.

Q. Did he express any reason why he would not consent to any proceedings at that time?

A. He said he wanted the opinion of counsel who had had nothing whatever to do with the case, in reference to the mandamus proceedings, before he would decide on any course.

Q. He wanted the opinion of counsel who had had nothing to do with the case?

A. Yes.

Q. Did he indicate any special counsel, or not?

A. No; not at that particular time.

Q. And then, how long afterwards was it before he produced Mr. Potbury's opinion?

A. Well, I do not just recollect the date of that letter. It was not long.

Q. Mr. Parish understood what mandamus was, didn't he?

A. Well, I imagine so, because we discussed it there in his presence.

Q. Do you know whether the opinion of any other counsel was asked or sought as to the propriety of mandamus?

A. Mr. Parish stated that he would be glad to obtain Mr. Darlington's opinion, and Mr. Potbury and myself were at Mr. Darlington's office with respect to getting his opinion, and Mr. Darlington referred us to Messrs. Cole and Donaldson.

Q. Mr. Darlington did not have a ready-made opinion on hand, then?

A. No.

Q. Did he hear the case at all; did you state the case to Mr. Darlington?

A. I do not think I was in Mr. Darlington's office but two or three minutes, if I was there that long.

Mr. CONRAD: That is all.

Redirect examination.

By Mr. NATHANIEL WILSON:

Q. I have one or two questions. You have been asked if Mr. Parish recognized you as an attorney in this case, in speaking of it. State what if any intercourse took place between you and Mr. Parish in regard to the case, and during what period?

A. You mean as counsel?

Q. What if any intercourse took place between you and Mr. Parish in regard to the case, and during what period. That covers the whole time.

A. Well, I never had any contract with Mr. Parish in any shape or form.

Q. What if any intercourse took place between you and Mr. Parish with regard to the case?

A. He would come into the office when I would be there or Mr. Brookshire was there, or both of us were there, and we would discuss the case time after time. I suppose if he has been in the office once he has been in the office two or three hundred times. He was practically a daily visitor at the office.

Q. Covering what period?

A. Well, from the middle of 1900 down to about August, 1904—July or August, 1904.

Q. When he came on those occasions with whom did he talk; with whom did he confer or consult?

A. He usually came in to see Mr. Brookshire. But if Mr. Brookshire was not there, why he would talk with me about the case.

Q. That was the course of the proceeding during all that period?

A. During all of that period.

Q. What contract or undertaking was there, at any time, on the part of Mr. Parish to employ or pay you for any services rendered by you in the case?

A. There was absolutely no contract. However, he did state to

me that he would give me a contract, but he never did. That was not in connection, however, with the ice case, but in connection with judgments which were pending against him in the local courts. He said that after the ice case was through with, in all probability he would require the services of an attorney in the local courts in connection with judgments which had been obtained against him and said he would give me employment in that respect.

ELLWOOD P. MOREY.

Subscribed and sworn to before me this fourth day of April, A. D. 1910.

E. L. WHITE,
Examiner in Chancery.

(Thereupon, at 2:15 o'clock, p. m., an adjournment was taken until Tuesday, March 22, 1910, at 3:30 o'clock, p. m.)

E. L. WHITE,
Examiner in Chancery.

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WASHINGTON, D. C., March 22, 1910—

Tuesday, at 3:30 o'clock p. m.

Met, pursuant to adjournment, at the office of Messrs. Nathaniel Wilson and Clarence R. Wilson in the Pacific Building.

Present on behalf of the plaintiff McGowan, Messrs. Nathaniel Wilson and Clarence R. Wilson.

Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Present, also, the defendant Emily E. Parish and Grant Parish.

Mr. CONRAD: Mr. Morey produces, pursuant to the request made at the last hearing, the original contract between Mr. Parish and Mr. Brookshire and the assignment thereon by Mr. Brookshire to Mr. Morey, in the following words:

"For value received, I hereby sell and assign to Elwood P. Morey a one-half interest in and to the within contract dated January 21, 1903.

"(Signed)

E. V. BROOKSHIRE."

He has also produced a similar assignment, in the some words, on the contract between Mr. Brookshire and Mr. McGowan.

I now produce the original of the letter dated November 19, 1904, from Mr. McGowan, Mr. Brookshire and Mr. Morey to Mr. J. W. Parish, a copy of which is already in evidence. It is agreed that the letter copied into the record is a correct copy of the original.

Whereupon, GRANT PARISH, a witness of lawful age, produced by and on behalf of the plaintiffs, being first duly sworn, is examined.

By Mr. DARLINGTON:

Q. Mr. Parish, you are the son of the late Joseph W. Parish, are you not?

A. I am.

Q. I want to show you a letter bearing your name, addressed to one E. V. Brookshire, dated "2/13/06" and ask you if that is your signature (handing witness paper)?

A. (After examination.) I believe that is my letter.

Q. You haven't any doubt about it have you, Mr. Parish?

A. No doubt whatever.

Q. You wrote that letter and sent it to Mr. Brookshire, did you?

A. I did.

Q. Is it true that Mr. Brookshire had had numerous conferences with you relative to the prosecution of the claim of your father's estate against the United States Government?

A. How is that?

Q. Is it true that Mr. Brookshire had had numerous conferences with you, at your office, relative to the prosecution of the claim of your father's estate against the United States Government, before you wrote this letter?

A. Before I wrote that letter?

Q. Yes.

A. He had called at my office frequently to talk to me on a mysterious method that he had to prosecute this case, and I had on each occasion referred him to Major Holmes Conrad.

53 Mr. DARLINGTON: I move to strike out the answer as not responsive to the question.

By Mr. DARLINGTON:

Q. My question, Mr. Parish, is whether Mr. Brookshire had had numerous conferences with you before you wrote this letter, relative to the prosecution of the claim of your father's estate against the United States Government.

A. I can't answer otherwise than I have answered before, that he had called and had a mysterious method which he refused to divulge, and I referred him to Major Conrad, the attorney in this case.

Q. Were those conversations relative to the prosecution of the claim of your father's estate against the government?

A. In a tentative manner.

Q. In a tentative manner?

A. In a tentative way, he approached the subject.

Q. Over how long a period had those conferences extended?

A. Now, that I can't say.

Q. How soon after your father's death did they begin?

A. In fact, I can't recall that. I was simply an heir of the estate, and had no authority whatever—

Q. That is not the question at all, Mr. Parish. How shortly after your father's death was the first of those calls made? Was it as long as thirty days?

A. I can't recall.

Q. Was it as long as sixty days?

A. What is the date of that letter?

Q. The 13th of February, 1906.

A. 1906? I can't recall. He called numerous times, and as a business man I had other matters for my mind to be occupied and can't recall when they began.

Q. What was the date of your father's death?

A. On the 26th, I think, of December, wasn't it, 1904.

Q. Was it as long as four or five months after your father's death that Mr. Brookshire first called on you?

A. That I can't recall.

Q. When did you employ Major Holmes Conrad?

A. The contract with him will state. I can't recall it.

Mr. DARLINGTON: Gentlemen, do you mind giving us the date of that contract?

Mr. CONRAD: I will have to look for it; I have it somewhere in these papers.

By Mr. DARLINGTON:

Q. This letter states, Mr. Parish, "I find myself most emphatically against any change of proceedings inaugurated by my father after the Shaw decision and before his death." What were the proceedings inaugurated by your father after the Shaw decision and before his death?

A. (Examining letter.) That possibly was based upon the letter he had just had—a copy of the answer that he answered them.

Q. What did you mean by any change of proceedings?

54 A. I presume he had his own basis of operation; otherwise he would not have dictated that letter to them in reply to what he called an "infamous threat."

Q. My question is, what did you mean by any change of proceedings than those pursued by your father? Did you mean the employment of Mr. Brookshire and Mr. McGowan?

A. Give me that again, please.

Q. I ask you what did you mean by opposing any change of proceedings. Did you mean the employment of Mr. Brookshire and Mr. McGowan in the further prosecution of the claim?

A. I didn't suppose he did anything other than stated in father's letter to them.

Q. What did you understand to be stated in that letter?

A. I can't say that.

Q. Did it mean, then, that he was through with them?

A. Well, I am not a clairvoyant and consequently didn't know what father's thought was.

Q. I'm asking you what you meant by your being opposed to any change of proceedings. What change was it you were opposed to?

A. At that stage of the proceedings, I was governed by my father's letter to them.

Q. And you were opposed to any change, as that letter stated?

A. I had no business in the matter; I was only an heir.

Q. When you wrote this letter, you meant you were opposed to any change from the position taken by your father in that letter?

A. For one who had no legal authority——

Q. Is that what you meant, Mr. Parish?

A. I meant exactly "from" the impression my father made on me from that letter. That was my impression.

Q. What was that impression?

A. The letter will show for itself.

Q. What was your impression about the matter?

A. My impression was the same as the letter stated.

Q. You further state in this letter: "that he did not propose any further alliance with either one or collectively"—with either one of whom?

A. I presume of them as to whom that letter was addressed to.

Q. Whom did you mean?

A. What is that?

Q. Just give their names.

A. Well, to those that letter is addressed—the late attorneys.

Q. You mean Mr. Brookshire, Mr. McGowan and Mr. Morey?

A. Yes.

Q. Are those the attorneys to whom you refer to in this letter, whose names appeared on the briefs?

Mr. CONRAD: Let me look at that mysterious letter.

By Mr. DARLINGTON:

Q. My question, Mr. Parish, is whether Mr. McGowan and Mr. Brookshire are the gentlemen referred to as "attorneys whose names adorn the briefs." Are they the men you meant by that?

A. I was speaking of those names, as the letter was addressed to them.

Q. And you meant Mr. McGowan and Mr. Brookshire?

A. I meant them; yes.

55 Q. You state in this letter "We have it in our father's own handwriting * * * that he did not propose any further alliance with either one or collectively." Have you had handwriting?

A. You have the original letter.

Q. That refers to this letter of November 19?

A. I did. It is all based on that letter in my father's handwriting, as under his signature.

Q. You didn't have that letter that your father sent to Mr. McGowan, Mr. Brookshire and Mr. Morey; did you?

A. I had a copy of that letter. It is now in your hands.

Q. You mean the paper that your counsel just handed me, do you (handing witness paper)? Can you look at it and state if that is the paper you refer to?

A. I think that is the original of that letter.

Q. Please read from this letter, which you say was the original, the statement in your letter that your father did not propose any further alliance with either one or collectively.

A. I construe the meaning of this letter to that effect.

Q. Did you talk with your father about this matter?

A. Very little.

Q. At all?

A. Very little.

Q. At all?

A. At times. I knew very little of my father's affairs.

Q. You did talk with him to some extent about the relations he had with the three, or any one of them, after this letter of his, however?

A. Such as what would be mutual conversations.

Q. And were they in the line of this letter that you have just produced, to Mr. Brookshire, of February 13?

A. It was as much in the line of what his mind expressed in that letter to them.

Q. And in accord with what you said in your letter to Mr. Brookshire, or not?

A. The letter that I addressed to Mr. Brookshire is my own impression that I got from that letter.

Q. From conversation with your father, or not?

A. No; in that I cannot recall.

Q. It was not from conversation, then, but from this letter?

A. The letter you now refer to was much prompted by me from the annoyance Mr. Brookshire caused me by coming to my office when I was not of legal importance in father's estate, not being the executor and only of the heirs.

Q. Did you tell him you were not the executor and for him to see some one else?

A. I referred him to Major Holmes Conrad and to my sister.

Q. You did do that?

A. I referred him to Major Holmes Conrad.

Q. Did you refer him to your sister at that time?

A. I can't recall.

Cross-examination:

56 Mr. CONRAD: The foregoing testimony, so far as it embraces the letter from Mr. Parish to Mr. Brookshire, and the statements of the witness thereon, are excepted to on the ground that Mr. Parish is not a party to this cause or a party in interest. His correspondence with Mr. Brookshire and conversations with Mr. Brookshire are res inter alia.

Mr. DARLINGTON: I submit the objection comes rather late, after his examination is closed.

Mr. CONRAD: I had no opportunity to make the objection during his examination.

By Mr. CONRAD:

Q. You state that Mr. Brookshire referred to some mysterious method that he had to handle this matter. What did you mean by that? Did you make any memorandum of your conversation at that time with Mr. Brookshire—

Mr. DARLINGTON: Just one moment. I have no objection to this question being asked and answered, but give notice that counsel is making the witness his own. His statement in regard to Mr. Brookshire's alleged mysterious methods was objected to by me and moved to be stricken out.

Mr. CONRAD: On the contrary, you made him yours, and you are responsible for what he says.

By Mr. CONRAD:

Q. Did you make any memorandum of that conversation after Mr. Brookshire left your office?

A. I made a memorandum of a number of his visits.

Q. Well now, please, tell me when you spoke of Mr. Brookshire's suggestion indicating some mysterious method that he had, what you meant by that.

Mr. DARLINGTON: Is it agreed that my objection shall apply to all this line of questioning without being repeated?

Mr. CONRAD: Oh, yes.

By Mr. CONRAD:

Q. What did you mean by that?

A. I mean that he, in an evasive manner, stated that he had a method to recover and would not disclose it. Secondly, I was only an heir and no authority vested upon me, and I referred him to Major Conrad.

Q. Now, Mr. Parish, in that conversation you say Mr. Brookshire did not disclose to you what this method was. Did you ask him what it was?

A. I asked him repeatedly.

Q. And what did he say?

A. Mr. Brookshire has had a number of conversations with me.

Q. What was his reply when you asked him to tell you what his method was; what did he say?

A. His answer—when I would ask him for an intelligent distinction of what he meant by his mysterious way, he was evasive and then he would conclude by leaving my office.

Mr. DARLINGTON: I object to the answer on the further
57 ground that it does not state any facts, but simply a conclusion of the witness.

By Mr. CONRAD:

Q. Did Mr. Brookshire ever suggest to you mandamus as an appropriate remedy?

A. Most emphatically not.

Q. Did he ever say anything about mandamus?

A. Repeatedly.

Q. What would he say?

A. In all his remarks coming to my office, he criticized the acts of Messrs. Conrad and Robinson and stated that the mandamus was an improper method to pursue and, to use a legal phrase, would not lie.

Q. That was, the mandamus would not lie?

A. Mandamus would not lie; but that he had a method that would be successful, and on each occasion I referred him to you saying that you were ready and willing to consider any proposition that would lead to a successful conclusion.

Q. Did Mr. Brookshire ever state to you that he had had a revelation made to him in darkness, and at night, about this case?

Mr. DARLINGTON: Does counsel still consider that is matter testified to by the witness on direct examination?

Mr. CONRAD: I do; and it is cross examination.

Mr. DARLINGTON: I renew my objection.

A. On one occasion I distinctly remember that after giving his opinion that mandamus was wrong and walking backwards and forwards in my office, he stated virtually as follows, he says, "Parish, I have a brief; I have written a brief in connection with this case; I wrote it in the darkness and in bed. Now, by God, this brief will win you this case." But knowing that Mr. Brookshire was a spiritualist, why, of course, I let that go for what it was worth.

Q. Mr. Parish, did Mr. Brookshire on any one of those visits to you ever state to you that he stood ready to carry out the contract he had made with your father in this case; did he ever tell you that he was ready and willing and anxious to do so?

A. He never told me that he was willing, ready or anxious to continue in this case. He always talked with regard to this method of procedure of which I always referred him to you.

Q. And he never did disclose to you what his method of procedure was that he had in mind?

A. Absolutely not.

Q. Did you ask him for it and he declined to give it to you?

A. Repeatedly.

Q. Did he ever call at your office after the case had been decided against us in the lower courts?

A. He called almost immediately after the first decision in the lower court.

Q. What did he have to say about that?

Mr. DARLINGTON: I object. This is matter subsequent in date to anything about which I asked him; and I give notice that I will move to strike out his deposition or have it treated as original testimony taken on behalf of the defendants.

(The question was read by the stenographer as follows:)

58 By Mr. CONRAD:

"Q. What did he have to say about that?"

A. He renewed his overture.

Q. What do you mean by his renewing his overtures; don't use words you don't know the meaning of.

A. He renewed his application to furnish a method, legal method, and strengthened his remarks by referring to the fact that we had lost in the first decision in the lower court.

Q. That was after Judge Anderson's decision?

A. That was after Judge Anderson's decision.

Q. Did he make a visit to you, or not, after the decision of the Court of Appeals was rendered?

A. He called immediately following the decision of the Court of Appeals, and stated that this was evidence that he was right that mandamus would not lie; that we had already received two adverse decisions in our favor.

Q. Mr. Parish, you are not Executor of your father's will are you?

A. I am not.

Q. Were you at any time authorized by him to speak for him, or act for him in this matter, with anybody?

A. On one occasion.

Q. Have you ever been authorized by the Executrix, Miss Parish, to represent her or speak for her in this matter?

A. None that I am aware of.

Redirect examination.

By Mr. DARLINGTON:

Q. When was the decision of Judge Anderson, about which you have spoken, Mr. Parish?

A. I can't recall; but the records will show that.

Q. Was it before or after February 13, 1906, the date of your letter to Mr. Brookshire?

Mr. CONRAD: One moment. I wish to note an objection here on behalf of the defendant to any further examination by the counsel calling this witness, in matters upon which he was or might have been originally examined in chief.

(The question was repeated by the stenographer as follows:)

By Mr. DARLINGTON:

"Q. Was it before or after February 13, 1906, the date of your letter to Mr. Brookshire?"

A. You mean the Anderson decision?

Q. Yes.

A. That I can't recall.

Q. Was the subject of mandamus discussed between you and Mr. Brookshire in any way before the Anderson decision?

A. The subject of mandamus was brought up in most all of the conferences he had in my office.

Q. Before the Anderson decision?

A. Before the Anderson decision and after the Anderson decision. The fact is that he was utterly opposed and condemned those proceedings as illogical and would not lie.

Q. Had any mandamus proceedings been instituted at the time of his first call on you, after your father's death?

A. That I can't recall.

Q. Did he discuss mandamus at the first call?

A. Possibly he did.

Q. Possibly?

A. Possibly. If he did, it was in order to discourage that method of proceeding.

Q. Mr. Parish, if you don't know whether he mentioned it at all, or not, how do you know it was to discourage that method of proceeding?

Mr. CONRAD: He said "If he did, it was."

(The question was read by the stenographer as follows:)

"Q. Mr. Parish, if you don't know whether he mentioned it at all, or not, how do you know it was to discourage that method of proceeding?"

A. In my remembrance he did mention it.

Q. Do you think that was before they were brought?

A. Before they were brought—possibly before and after. I can't recall those court dates at the same time with his calling at my office.

Q. Do you remember whether he ever mentioned mandamus before the mandamus proceedings were brought by Major Conrad and Mr. Robinson and, if so, how did the subject come up between you at that time?

A. Any conversations that were employed in these conferences were based largely, if not wholly, on his mysterious plan of proceedings, of which he was at all times unwilling to disclose.

Mr. DARLINGTON: I move to strike out the answer as not responsive to the question asked the witness.

(The question was read by the stenographer as follows:)

"Q. Do you remember whether he ever mentioned mandamus before the mandamus proceedings were brought by Major Conrad and Mr. Robinson and, if so, how did the subject come up between you at that time?"

A. The subject of mandamus, if it was brought up, was in a general part of the conversation that was being employed.

Q. Was it brought up before Messrs. Conrad and Robinson instituted mandamus proceedings?

A. That I can't recall.

Q. You don't remember whether it was or not?

A. I can't recall.

Q. And yet you think your letter of February 13, 1906, was written because he was annoying you by opposing mandamus and proposing other methods?

Mr. CONRAD: He has not said that. I object to that question, because it is based upon fictitious grounds. The witness has not stated that his letter to Mr. Brookshire was suggested by any matter of mandamus at all. He said that Mr. Brookshire was annoying him by his frequent visits to his office.

Mr. DARLINGTON: After this interruption, the question is withdrawn.

By Mr. DARLINGTON:

Q. You say that when he mentioned to you that he had some method of procedure, you referred him to Messrs. Conrad and Robinson?

A. I referred him to Major Holmes Conrad and Mr. Robinson.

Q. That was before you wrote him this letter of February 13, 1906?

Mr. CONRAD: I object to that question. The witness is on cross-examination.

(The question is read by the stenographer as follows:)

By Mr. DARLINGTON:

"Q. That was before you wrote him this letter of February 13, 1906?"

A. That, I can't recall.

Q. Why did you refer him to Messrs. Conrad and Robinson?

A. How is that?

Q. Why did you refer him to Messrs. Conrad and Robinson?

A. Because they were retained by the Executrix to represent father's estate, and I had no voice in the matter whatever.

A. You never had any voice in the matter of the prosecution of the claim after your father's death?

A. Not legally.

Q. What do you mean by that?

A. In legal form. I was interested in father's estate only as an heir.

Q. Where were you living from the time of your father's death and down to the present time?

A. 217 A Street, southeast.

Q. Where was your sister living at that time?

A. In the same house.

Q. Were you, or were you not, the bearer of communications between her and her counsel, from the time this case started down to the present time?

A. Simply what takes place between brother and sister?

Q. And you were the medium of communication between her and counsel?

A. Not on important matters.

Q. Were Messrs. Cole and Donaldson your sister's attorneys at any time?

A. Never in any way whatsoever, in the ice-claim.

Q. Were they her attorneys at any time?

A. At no time whatever.

Q. Did you ever carry any communication from your sister, of any sort, to them about this case?

Q. What is the question?

Q. Did you ever carry any communication from your sister, of any sort, to them about this case?

A. In the matter simply to arrange an interview between the late Judge C. C. Cole to meet my sister which, at that time, never had been done in regard to father's estate.

Q. Did you see the letter written by your father's former counsel, Mr. Brookshire and Mr. McGowan, to Cole & Donaldson?

A. I never had any knowledge of that letter.

Q. You never had any knowledge of that letter; are you quite sure about that?

A. I am quite sure.

Q. When did you first hear of that letter?

A. I can't say that I heard of any.

Q. You never saw or heard of a letter signed by Messrs. Mc-

Gowan, Brookshire and Morey to Cole & Donaldson, about their being associated with them in the prosecution of this case?

A. The first knowledge I had of any such letter was given in Mr. Morey's testimony.

61 Q. That was the first you ever heard of that?

A. That was the first I ever heard of it.

Q. You told Mr. Brookshire that Messrs. Conrad and Robinson were willing and ready to follow any method which would be successful?

A. I referred to that in those words.

Q. How did you know that?

Mr. CONRAD: Just a moment please. I want to object to that.

Mr. DARLINGTON: I have already agreed that your objection should apply to all of this, and I will note on the record again that this entire line of examination may be subject to the same objection that has heretofore been made.

(The two previous questions were read by the stenographer as follows:)

By Mr. DARLINGTON:

"Q. You told Mr. Brookshire that Messrs. Conrad and Robinson were willing and ready to follow any method which would be successful? A. I referred to that in those words.

"Q. How did you know that?"

A. I spoke to Major Conrad with reference to these numerous visits to my office by Mr. Brookshire and Mr. Conrad being our counsel—that is father's counsel—for the estate, was the proper one to refer him to.

Q. Did you speak to your sister about it?

A. Possibly.

Q. Is that the best answer you can make?

A. I can't recall.

Q. Did you speak to your sister about Mr. Brookshire's repeated visits to your office, or any of them?

A. Possibly I didn't at the time.

Q. You have no doubt about it, have you?

A. I can't recall matters at the distance and matters to me which were not of much importance.

Q. You had an equal interest in this claim with your sister did you not?

A. We all enjoyed the same share.

Q. And you lived in the same house with her all the time?

A. I did.

Q. The various events in the course of the case were matters of conversation between you from time to time, as they occurred, were they not?

A. As naturally to be expected.

Q. Did you tell your sister that you had referred Mr. Brookshire to Messrs. Conrad and Robinson to disclose his method of procedure?

A. That I can't recall at this time.

Q. Have you any doubt upon the subject?

A. Well, I simply say that I can't recall the fact that I did.

Mr. DARLINGTON: We offer this letter in evidence.

(This letter so offered is filed and marked "Plaintiff's" Exhibit M. & B. No. 7, and is as follows:)

WASHINGTON, D. C., 2/13, 1906.

"Hon. E. V. Brookshire, Washington, D. C.

"DEAR SIR: I address you as one of the heirs of the estate of the late J. W. Parish, in reference to the numerous conferences you have had with me in my office, relative to the prosecution of the claim of my father's estate against the U. S. Gov. etc.;

I have given your statements considerable consideration, but after a cool and impartial analysis of the entire subject, I find myself most emphatically against any change of proceedings inaugurated by my father after the Shaw decision and before his death. We have it in our father's own handwriting (in the flesh and not in the spirit) that he did not propose any further alliance with either one or collectively; the att'ys whose names adorn the briefs and who mutilated and made impossible to recover what was due him, as stated by the Auditor of the Treasury.

"As one of the heirs I would appose and contest to the bitter end and the last ditch, with the last cartridge gone, any change from my father's plan of action, in his own handwriting, as we found them at the time of his death.

Yours truly,

GRANT PARISH."

Recross-examination.

By Mr. CONRAD:

Q. Just one question. You said you did go to Cole & Donaldson's office. Did you go alone or go with any one else?

A. We had an appointment with the late Judge C. C. Cole.

Q. Who had an appointment?

A. My sister.

Q. Who made the appointment?

A. The appointment was made in the presence of Mr. Cole and myself and Mr. Thom McKee.

Q. My question is a very simple thing: Who went with you, if any one, to Cole & Donaldson's office to make this appointment. Who went with you; any one?

A. For the meeting with my sister?

Q. To make the appointment—to make the appointment with you?

A. Mr. Potbury and Mr. McKee and I visited Judge C. C. Cole in reference to this matter.

Q. Did you have any conversation with Judge Cole?

A. I had some conversation with Judge Cole and he said he would like to see my sister. I reported that to my sister and a time

was designated, I think—sister was to call on a certain day. We presented ourselves at the door of Messrs. Cole & Donaldson's law offices and we found the door was locked. In response to a knock a young lady came to the door and I inquired if Judge Cole was in and she stated that Judge Cole had died about fifteen minutes before. So we came away.

Q. Now, I ask you this: Did you or your sister, to your own personal knowledge, ever employ the firm of Cole and Donaldson, or either member of that firm, to represent your father's estate?

A. Most emphatically not; and there is no evidence to show it.

Q. I am not talking about evidence; I am talking about what you know.

A. Most emphatically not, because Judge C. C. Cole was dead before we had our conference.

Mr. DARLINGTON: Then neither Judge Cole nor Mr. Donaldson were ever employed as attorneys?

A. Not in any way, by myself or my sister.

63 Mr. DARLINGTON: Have you any objection, or will you make any opposition to Mr. Donaldson coming here on the stand, on the ground of privilege?

Mr. CONRAD: Not the slightest.

Mr. DARLINGTON: And that will apply equally to Mr. Potbury?

Mr. CONRAD: It will apply equally to Mr. Potbury.

By Mr. CONRAD:

Q. Was Mr. Potbury ever your attorney?

A. Mr. Potbury was attorney of the estate of father simply in the matter of probating the will, and no other whatsoever.

Mr. DARLINGTON: Then I understand it is agreed, gentlemen, that whatever evidence on this point, of this witness' conduct of the case either for himself, his sister or his father, can be given by Mr. Donaldson or by Mr. Potbury, and will not be claimed as privileged?

Mr. CONRAD: Not at all. You may call either one of them on that or any other matter.

GRANT PARISH.

Subscribed and sworn to before me this 26th day of April A. D. 1910.

E. L. WHITE,
Examiner in Chancery.

ELIJAH V. BROOKSHIRE, called as a witness in his own behalf, being first duly sworn, is examined

By Mr. DARLINGTON:

Q: Mr. Brookshire you are one of the complainants in this case?

A. Yes, sir.

Q. What is your vocation?

A. I am a lawyer by profession.

Q. Are you the E. V. Brookshire who is named in the contract with Mr. J. W. Parish that has been produced in evidence here?

A. I am.

Mr. CONRAD: Further examination of this witness is objected to on behalf of the defendants in this case on the ground that he is a party to the cause and because Mr. Parish who was interested in the transactions had with him, is dead. We except to it on the ground that it is incompetent to testify to any conversations or transactions and give notice that we shall move to strike out the testimony at the hearing.

Mr. DARLINGTON: It is stipulated between counsel that Mr. Brookshire is the E. V. Brookshire who signed the contracts—one with Mr. McGowan and one with Mr. J. W. Parish, as testified to by Mr. Morey.

The WITNESS: My name does not appear on the McGowan contract.

Mr. DARLINGTON: It appears on the assignment of it?

The WITNESS: Oh, yes.

64 By Mr. DARLINGTON:

Q. Mr. Brookshire, without referring to any communications with or transactions with Mr. Parish, please state succinctly, but fully, what services you performed in the matter of his claim against the Government for ice contracted to be furnished during the Civil War?

A. The first services I performed were performed in the prosecution of the claim before the Congress of the United States in the House of Representatives, before the Committee on Claims. Mr. McGowan at the beginning of the 57th Congress, stated that he would take charge of the matter himself in the Senate.

On the first Monday, I think, of December, 1901, a bill was introduced in the Senate which was No. 475, to refer Mr. Parish's claim to the Secretary of the Treasury for adjudication. Then Bill 475 was referred to the Committee on Claims of the Senate and was from the Senate thereafter referred to the sub-committee and reported back to the Senate with a favorable recommendation and without amendment, on the 5th day of February, 1902.

On the 3d day of March, following, the bill passed the Senate and went to the House of Representatives. It was there referred to the Committee on Claims of the House, and by the Committee on Claims of the House it was referred to Sub-Committee No. 1. The Committee consisted, I think, of fifteen members, divided in five sub-committees of three. The Sub-committee No. 1 was composed of Mr. Graff, of Illinois, Chairman of the Committee, Lot Thomas of Iowa, and Peter J. Otey, of Virginia, the two first named gentlemen being lawyers in profession.

I appeared before the sub-committee in March, 1902, and made a preliminary presentation of the case to the sub-committee for the purpose of ascertaining what points would be raised and getting the case opened, so that I might proceed from time to time to meet any requirements or demands which the committee might make.

There was a number of inquiries made by this sub-committee. They desired to know whether Mr. Parish had possessed himself of the necessary amount of ice, to wit, thirty thousand tons, to have fulfilled the conditions of his contract. They desired to know if he was prepared to deliver the ice, provided he had the necessary amount; and whether he had been guilty of any default. Another question presented to the committee by the bill was as to whether the rule of damages laid down in the Parish Case, 100 U. S., page 500, which was a very narrow rule of damages; or whether the rule of damages laid down in the Behan Case should be substituted in lieu of the rule of damages laid down in the Parish Case.

The presentation of these several inquiries made by the committee necessitated going into the evidence most fully. There was a record of the evidence that had been taken in the Parish case brought under the Act of Congress passed in 1872, and in that case there was a record of some three hundred pages, I think. I employed Mr. Morey—that is, I requested Mr. Morey—to go over the record and make a brief abridgment of the evidence on the
65 several points which had been raised by the Committee, so that I could take that to the committee and satisfy the committee, if possible, that their inquiries were properly answered.

I went before the Committee several times during the months of March, April and the first part of May, 1902, as often as I could get before the Committee—that is, the sub-committee—which was every short while. They had a meeting every week, and sometimes two meetings in a week. At these hearings questions of fact were discussed and memoranda, such as the committee had suggested might be presented, were gone over, and then I carried a number of law books to the Committee room.

Questions had been raised by the Committee and by Lot Thomas who was an ex-judge. He made several inquiries as to the law applicable to the case and wanted to know whether the facts in the Parish Case entitled him to the Behan rule of damages as against the rule laid down in the Supreme Court.

After discussing the fact and law of the case very fully before the committee, running over this period which I described, about the 1st of May, 1902, the sub-committee requested me to prepare a brief and legal argument of presentation of the points of the case that might seem to have application to the matter in hand. I spent a week in the Supreme Court Library, preparing this statement, and after I had it typewritten I presented it to Mr. McGowan for his approval—he being the senior counsel in the case and had been in the case for a considerable length of time before I came into it. Mr. Morey also went over the statement and, with perhaps some little trifling changes—a word here and there—it was re-typewritten for presentation to the committee. I think about the 8th or 9th day of May, 1902 I took it up to the committee and handed it to the chairman of the Committee, who was Mr. Graff or Lot Thomas, I do not remember which.

On the 19th day of May, 1902, Mr. Graff reported Senate Bill No. 475 to the House with a favorable report, which is House Report

No. 2104, 57th Congress, 1st Session. This House report, which I hold in my hand, is the Senate Report adopted by the House and contains the brief, bodily, which is made a part of the Report of the House. In other words, the committee made my law brief part of the report, and that portion of the House Report beginning on page 4 with the words "the following is made a part of the report" and all of the balance of the report on pages 4, 5, 6 and 7, was prepared by me and adopted by the committee without change.

Q. Is that a copy of the report?

A. Yes. This is the Senate report (indicating).

Mr. DARLINGTON: We offer both of those reports in evidence.

(The papers so offered are appended to the record marked "complainants' Exhibits M. & B. Nos. 8 and 9.)

By Mr. DARLINGTON:

Q. Now you may proceed, Mr. Brookshire.

A. The 57th Congress adjourned without day, on the 1st day of July, 1902—

66 Q. That is the 1st Session?

A. That is the 1st Session—and reconvened, pursuant to the Constitution, on the first Monday in December, 1902.

On the 30th day of January, 1903, Senate Bill No. 475 was taken up in the House and discussed and on the 3d day of March, following—the bill being discussed on two days—the bill passed the House and Senate Bill No. 475 was approved by the President on the 17th day of February, 1903.

Shall I detail what took place in the department?

Q. Yes; the history of your connection with the case.

A. The bill that had passed (Bill No. 475) authorized the Secretary of the Treasury to find whatever balance was due Mr. Parish. It was first taken up in the Treasury Department, in the office of the Auditor for the War Department. It was taken up for consideration in the month of March, 1903.

As soon as the Auditor was ready Mr. McGowan informed us, Mr. Morey and myself, that the matter was up for consideration in the office of the Auditor for the War Department and that we should set about and prepare a brief setting forth what our construction of the bill was and a calculation showing what balance, in our judgment, was due, for the aid of the Law Board to which it had been referred. There was a law board in the Auditor's Office, composed of Mr. Eldridge, Mr. Kern and Mr. Medford. A brief was very carefully prepared in the early part of March, 1902, and was filed in the office of the Auditor on the 20th day of March, I think.

Mr. NATHANIEL WILSON: 1903?

The WITNESS: 1903.

A. (Continuing:) Immediately after that we had numerous meetings—perhaps two or three meetings a week—about the case and we would go down ordinarily to Mr. McGowan's office, it being very near to the Treasury Department, and we having offices in the Washington Loan and Trust Building, and we would consult about

the case. Mr. McGowan made numerous trips, two or three trips a week, over to the Treasury Department, and if they desired any light on the case he would report back to us the views he had presented to the Law Board.

The matter went along, considerable work being done from week to week, until about the 1st of June, when we filed two more briefs in the office of the Auditor. Numerous points have been raised; as to the preparedness of Mr. Parish to deliver the ice; questions as to the application of the Behan rule; as to whether the evidence as to the cost of transportation and as to whether the Behan rule fit the evidence taken in the Parish case. And there was a great deal of time devoted to the case in order to get it along as rapidly as possible in the department so that there would be no delay in the consideration of the case because of any neglect on our part.

After the case had been in the Department for about five and a half months, the Auditor made a favorable finding, finding a balance of one hundred and eighty-one thousand dollars, in round numbers, as the balance due Mr. Parish, and a letter was
67 written by Mr. Rittman, the Auditor, to Mr. Parish in care of Mr. McGowan, the attorney of record.

Shortly thereafter, Mr. McGowan made a trip to the Treasury Department and learned that the matter had been sent to Mr. Tracewell, the Comptroller, for an advisory opinion, and he had a further conference with Mr. Tracewell about the matter.

Mr. CONRAD: Were you present?

The WITNESS: I am telling what Mr. McGowan said.

Mr. CONRAD: You know you ought not to do that, Mr. Brookshire; you are a lawyer. It just encumbers the record.

Mr. DARLINGTON: I think the witness has a right to state any communication received from any one else leading to a communication by himself. The witness has a right to state what it was. It can be noted on the record that an exception is taken on the part of the defendants to the testimony heretofore given by this witness as to any conversations had by him after the death of J. W. Parish.

Mr. NATHANIEL WILSON: This was not after the death of Mr. J. W. Parish.

Mr. CONRAD: Now it is. I except to conversations had with him by any one or to his repeating statements made to him by any one.

Mr. DARLINGTON: I suppose you don't question his right to repeat statements made by the accounting officers of the Treasury Department?

Mr. CONRAD: He would not have a right to state that, in my judgment.

By Mr. DARLINGTON:

Q. Mr. Brookshire, I think you have a right to make any statements of occurrences, conversations and discussions which took place between the accounting officers, at least, and subject to Major Conrad's exception, will ask you to proceed.

A. I would state at this juncture that most of the visits that were made to the Department for the purpose of filing papers and obtain-

ing information and arranging about following the matter up were made by Mr. McGowan.

Q. Just omit those things, and tell what you did.

Mr. CONRAD: We don't question all those services at all.

Mr. DARLINGTON: In view of that statement of counsel, you may make this rather concise.

A. The Comptroller went away from the city during the month of August and was away perhaps a considerable part of September—

By Mr. DARLINGTON:

Q. I think we can expedite this, in view of the statement of counsel that he does not question the services that were rendered in the case. Did you or did you not participate in those services before the Auditor, the Comptroller, the Law Board and the Secretary?

A. Oh, yes.

68 Q. Then we can come down to the services rendered after the rejection of the claim by the Secretary of the Treasury.

A. In October—certain objections had been raised by the Comptroller—

Q. (Interrupting). I think we can save time by coming down to the Secretary's rejection of the claim. The gentlemen admit all up to that point. Just tell us what occurred after the rejection of the claim by the Secretary of the Treasury.

A. After the rejection?

Q. Yes.

A. The adverse opinion of the Secretary was given on the 31st day of May, 1904. I think the next day after his adverse opinion, I called on Mr. McGowan and advised with him about ways and means—

Mr. CONRAD: Are you going to say what you did pursuant to the conversation with him?

Mr. DARLINGTON: I repeat the exception, Mr. Conrad; Remember, all of this goes in subject to the exception.

A. (Continuing:) Mr. McGowan said that in about a week he would be prepared to hold a conference. In about a week after the decision, Mr. Morey and myself went to Mr. McGowan's office and discussed the course of remedy, and then we adjourned that meeting and we again met next, I think, within a week or so later. Then we still had a third meeting in the office of Mr. McGowan. There were three ways proposed concerning the claim: We discussed the proposition of asking the Secretary of the Treasury to reopen the case, and also the proposition of asking the Secretary to refer the claim to the Court of Claims under the second section of the Bowman Act. We also discussed mandamus at that time and I suggested to my associate counsel that it might be more expeditious to us if we could get the case reopened or referred to the Court of Claims. Mr. McGowan thought the appropriate remedy was mandamus. Mr. Morey entertained that view and I concurred in that view. It was suggested that—in short, I think that in August an opinion written by some lawyer was brought into the office.

Q. You started to say some suggestion was made.

A. Well, an opinion was brought into our office and then I think it was suggested that an opinion be obtained. I am not certain whether it was as to mandamus or what might be the proper remedy—from some lawyer who had not been connected with the case before the Department.

Mr. CONRAD: Please let me get that straight. You say an opinion was brought into your office by somebody on mandamus.

The WITNESS: I think that is the opinion on the 8th day of August, 1904.

Mr. CONRAD: And afterwards it was suggested that an opinion be gotten from somebody who had had no connection with the case?

The WITNESS: That is the way I remember it now.

By Mr. DARLINGTON:

Q. Let me ask you, at this point, whether the suggestion of obtaining a further opinion came from Mr. McGowan, Mr. Morey or yourself?

A. It did not.

69 Q. Was any outside lawyer mentioned in connection with this matter?

A. Yes. Your name was spoken of in connection with the matter

Q. Was that by Mr. McGowan, Mr. Morey or yourself?

A. Mr. Morey spoke of getting your opinion in the case and then, after that, the opinion of Judge Cole was spoken of. Mr. Parish ceased to come to our office in May 1904, sometime after the middle of May—the middle of August, I should say. Along three or four weeks later, perhaps in September, I went out of my office in the Washington Loan & Trust Building and got on a street car going west on F Street and Mr. Parish was in the car. I took a seat by his side and had a short conversation with him. If I am permitted to detail the conversation—

Mr. ROBINSON: Our objection applies to that.

Mr. DARLINGTON: It being objected to—

Mr. CONRAD: Oh, no; I haven't objected to it yet.

Mr. DARLINGTON: If it is not objected to, let us have it.

Mr. CONRAD: The objection has already been stated in the beginning. Now, if he details the conversation, he states it under that objection.

Mr. DARLINGTON: Unless counsel is more specific, makes some more specific reply, the witness is free to state the conversation.

Mr. CONRAD: Counsel is silent.

By Mr. DARLINGTON:

Q. All right, Mr. Brookshire; you may proceed.

A. I told Mr. Parish that Mr. McGowan, Mr. Morey and myself were very desirous to have an interview with him and that I hoped he would call at our office at his earliest convenience. We had reached 13th street, going west, and he bowed himself out of my presence and I considered he was nodding assent to my request. I

don't think he said he would come to the office, but seemed to nod assent and went out of the car. I don't think I ever saw him afterwards.

In the month of October, 1904, Mr. McGowan and myself requested Mr. Morey to go up to his house, No. 217 A Street, southeast, and see if he could communicate with Mr. Parish and ask him to come down to our office for the purpose of considering the case. Mr. Morey, I think, returned the first time and stated that he was unable, after ringing the bell, to get any response. He returned again a short while afterwards, in the same month of October, and on returning—

Q. Without stating what was said to you, just state whether this ever resulted in an interview with Mr. Parish.

A. It did not.

Q. What was the next step taken?

A. On the 19th of November, 1904, Mr. McGowan, Mr. Morey and myself wrote a letter to Mr. Parish which has been introduced in evidence.

Mr. DARLINGTON: We called for the original of that letter at the last session, and counsel have produced it. Is that the original?

The WITNESS: Yes; that is the letter.

70 Mr. DARLINGTON: We now offer the original in evidence and it is agreed that the copy which has been copied into the record is correct, and shall be received as the original for the purposes of this suit.

A. (Continuing:) On the 26th day of December, 1904, Mr. Parish died. Soon thereafter, Mr. Morey stated that he had met Mr. Golden Donaldson on the street—

Mr. CONRAD: Now, are you going into that. Mr. Morey testified to that and why should he state what has already been testified to.

Mr. DARLINGTON: As a part of his own conduct.

Mr. CONRAD: We object to it, of course.

A. (Continuing:) —and he stated that the firm of Cole and Donaldson would entertain a letter from us with a view of having a meeting for the purpose of arranging for us in the case. On or about the 1st of February, 1905, Mr. McGowan, Mr. Morey and myself wrote a letter to Cole & Donaldson—

By Mr. DONALDSON:

Q. What was the date of that?

A. It may have been January 31, 1905—and on the 17th day of March, 1905, Judge Cole died. Matters went along, but I heard nothing from anybody about any steps being taken in the case, by Mr. Donaldson, the surviving member of the firm, or anybody else. Perhaps a month, or two months, after the death of Judge Cole I called at the office of Mr. Grant Parish, and I made a number of calls at his office—that is, calls extending over a period at that time of ten months or up to the time of the writing of this letter by Mr. Parish which has just been introduced in evidence.

Q. The letter of February 13, 1906?

A. Yes; 1906. I told Mr. Parish, Mr. Grant Parish, that we were anxious—that Mr. McGowan, Mr. Morey and myself were anxious to go on with the case, and that there were three ways open to us: We could move to reopen the case; we could ask the Secretary of the Treasury to refer the case to the Court of Claims for an advisory opinion; or we could proceed by mandamus. I told him that I would be very glad if he would bring his sister and come to our offices and go into the matter with us, with a view of further prosecuting the case. On one or two of those occasions, Mr. Parish said that his father had said that it would be well to let the claim rest, or sleep, for a year or two; and that he and his sister proposed to carry out his father's wish.

Mr. CONRAD: Just a moment; I beg your pardon. The defendant excepts to any evidence of any conversation had between the witness and Mr. Grant Parish as to this matter and excepts on the further ground that this witness, produced by the complainant, by his testimony tends to contradict the statement of Mr. Grant Parish who was also produced by the complainant.

By Mr. DARLINGTON:

Q. You may proceed, Mr. Brookshire.

71 A. On perhaps the 10th of February, 1906, I went to the office of Mr. Grant Parish and he then told me that he and his sister had concluded to employ the services of Mr. Holmes Conrad or had employed the services of Mr. Conrad—I don't know whether they had employed his services in fact, or contemplated employing them.

I have no memory of having gone to Mr. Parish's office any more after that, until after the decision in the Court of Appeals. I was passing Mr. Parish's office, on New York Avenue, one day and he was coming out of his office with some letters in his hand—a letter or letters—to mail. I spoke to him. I told him that there was some real estate that was for sale—that a lady had some real estate for sale in western North Carolina. I told him I had seen where he had been selling some or had some for sale, perhaps down south, and asked him if he thought he could do anything with it. He asked me to come up in his office, and I went up, and then after discussing—talking about the matter generally, we had a few words about the case.

Q. Do you remember how that subject came up on that occasion?

A. I think he said to me, "You were present at the argument in the Court of Appeals when Mr. Conrad argued the case?" I told him I was, and he asked me what I thought about the case, about mandamus, and I told him that I did not know; that there had been two adverse opinions, written by two courts, but thought it might be that the Court of Claims would entertain jurisdiction of the case. Then I went out of his office, and I do not remember having been in his office at any other time.

Q. On what basis did you make this suggestion that the Court of Claims might entertain the matter?

A. I thought it was possible that the Court of Claims would entertain jurisdiction of the case on the law as laid down in the Medbury Case, 173 United States.

Q. On what occasions, if ever, did Mr. Grant Parish refer you to his sister?

A. He never referred me to his sister at any time, that I remember.

Q. On what occasions, if ever, did he refer you to Mr. Conrad and Mr. Robinson, or either of them?

A. I have no memory of such a suggestion.

Q. On what occasions, if ever, did he say to you that Messrs. Conrad and Robinson were willing and ready to follow any method which you would suggest that would be successful?

A. He never said that to me.

Q. And on what occasions, if any, did you criticise to Mr. Parish the acts of Messrs. Conrad and Robinson, or either of them?

A. I did not criticise their conduct. On the contrary, he asked me about them as lawyers, and I told him I thought they were good lawyers; that Mr. Holmes Conrad was a good lawyer, or had that reputation, but that I did not know him well, personally.

Q. On what occasion, if any, did you criticise the acts or conduct of the case by Mr. Robinson as a lawyer?

A. I never criticised the acts or conduct of Mr. Conrad nor of Mr. Robinson in my life, at any time.

Q. What can you tell us about this brief written in the darkness, Mr. Brookshire?

A. I do not know anything about that at all. I haven't any memory of anything of that sort being said.

Q. Did any such thing ever occur?

A. No.

Q. Did you write any brief in the darkness?

A. No.

Q. Did you ever say so to Mr. Grant Parish?

A. No.

Q. Did you say to him that you had written a brief in the darkness and "by God, that will win your case?"

A. No.

Q. You have heard Mr. Parish's testimony today about your spiritualistic connection or belief. What foundation is there for that statement?

A. No foundation at all.

Q. Are you a spiritualist?

A. No, sir.

Q. Have you ever been?

A. No, sir.

Q. Did the subject of spiritualism come up between you and Mr. Parish in connection with this case, or any other?

A. I think at one of those meetings in his office I told him that there was a bunch of slates in my office that his father had brought to my office from Keeler's, and had left them there.

Q. Who is Keeler?

A. Keeler is the medium. I asked him if he wanted them and he said, "No; I have a wagon load of slates he got up to Keeler's"; or something to that effect.

Q. Mr. Brookshire, you also heard Mr. Parish's statement about your having a certain mysterious method—some mysterious method which you wouldn't disclose—for winning this case. Please tell us as fully as you can, what fact or foundation or color of foundation he had for making that statement?

A. I can't imagine any foundation: I can't think of a thing. I always was frank with him in my conversation.

Q. You have mentioned several methods that you submitted to him—the application to the Secretary to re-open the case; an application to have the case referred to the Court of Claims for an advisory opinion; mandamus and, possibly, the Medbury opinion. Had you any other methods?

A. I think that embraces them all.

Q. You are positive that those four methods are all the methods you ever mentioned in your conversations with him?

A. You named mandamus?

Q. Yes.

A. Yes; I think they are.

Q. Was there any secrecy about any one of those four methods?

A. No.

Cross-examination.

By Mr. CONRAD:

Q. Mr. Brookshire, all of those services, as you have detailed them, rendered by you before Committees of Congress and the Executive Departments of the Government, were all rendered under and in pursuance of your contract of employment with Mr. J. W. Parish, were they not?

A. And my contract of employment with Mr. McGowan. I had two contracts.

Q. Yes; they were all under those contracts—you derived all of your authority to appear and act in this matter from those contracts, did you not? You could not have had any others?

A. Well, I might refer to the conversation——

73 Q. I am not talking about conversation. I am talking about written contracts. Just answer my question.

(The question was read by the stenographer as follows:)

"Q. Yes; they were all under those contracts—you derived all of your authority to appear and act in this matter from those contracts, did you not? You could not have had any others?"

Mr. CONRAD: Strike out the last of that; that is not a part of the question.

Mr. DARLINGTON: No; I object. That is what he answered.

Mr. CONRAD: Just answer the question.

A. I think so.

By Mr. CONRAD:

Q. How did you come to make the contract with Mr. Parish in this case; who was the first one you saw in this matter—the father of Grant Parish?

A. Why, I saw Mr. Parish.

Q. The old gentleman?

A. Yes.

Q. The first one?

A. Yes; the first Mr. Parish.

Q. Have you stated to Grant Parish and to his father that you had recently left Congress and that you could obtain the votes of a hundred Members of Congress in support of this measure?

A. I never made any such statement.

Q. You never made any such statement. Did you not publish a printed circular or hand bill, or letter of some sort, and have it distributed among the Members of Congress in this matter?

A. I mailed a circular letter, a copy of which I will give you if my counsel consents.

Q. Yes; we had better have that in if you have it.

A. (Producing paper.) That is an exact copy of the circular letter and the statement that was appended to it, and if the Senate Bill and the Senate and House reports were here, it would be complete.

Mr. DARLINGTON: They were enclosures?

The WITNESS: Yes; I enclosed the House Report and the Senate Report, and the Senate Bill.

Mr. CONRAD: We offer that in evidence.

(The paper so offered, was filed and marked "Defendant's Exhibit No. 1," and is appended hereto.)

Insert Defendant's Exhibit No. 1.

By Mr. CONRAD:

Q. To whom did you mail this?

A. To a number of members of Congress.

Q. To all of them?

A. No; I don't think so; I mailed it to some fifty or sixty Members.

Q. I don't know whether I correctly comprehended you, but I thought you said there was some question as to whether the conflicting rule of damages laid down by the Supreme Court of the United States, or the rule of damages laid down in the Behan case would apply. Did I understand you correctly?

74

DEFENDANT'S EXHIBIT No. 1.

Tel. Main 2230.

Law Offices Elijah V. Brookshire,
Wash. Loan & Trust Building (900-902 F Street N. W.), Wash-
ington, D. C.

WASHINGTON, D. C., January 14, 1903.

DEAR SIR: Please find enclosed a report on the claim of Mr. Joseph W. Parish. I am attorney for Mr. Parish.

I hope you will read the inclosed report at your earliest convenience, as I am informed that the bill for the relief of Mr. Parish will

be taken up for consideration on some Friday during the present month.

I wish you would also read said bill. I believe that when you have read the report and bill you will approve of the recommendations of the Senate and House Committees.

Please read the epitomized statement of Mr. Parish's case in the Supreme Court on next page.

Your judgment approving, I would be glad if you would give the bill your support.

Yours respectfully,

Law Offices Elijah V. Brookshire,
Wash. Loan & Trust Building (900-902 F Street N. W.), Wash-
ington, D. C.

Epitomized Statement of Mr. Parish's Case in the Supreme Court.

The Court of Claims in its Ninth Finding, said:

"IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract, and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

Here is a clear finding of a tender on the part of Parish, and a refusal on the part of the defendant. That said ninth finding was wholly overlooked by the Supreme Court is perfectly evident from the following extracts from the opinion:

"If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable."

"Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they cannot recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they were entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

75 100 U. S., 500.

In the Behan case (U. S. vs. Behan, 110 U. S., 338) the Supreme Court said:

"If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance less the value of the materials on hand; secondly, the profits that he would realize by performing the whole contract."

This rule of damages, which the Court in the Parish case admits should be the rule if a tender had been made, is so clearly just that the claimant is now entitled to have it applied if the Department finds that the facts bring the case within the rule.

On appeals from the Court of Claims to the Supreme Court, the facts can be presented only in special findings. The Supreme Court will not consider the evidence in detail.

De Groot vs. U. S., 5 Wall., 419.

A. What I meant to say was that the Committee appeared to hesitate—that is, unless upon a satisfactory showing—to approve the bill which substituted the rule of damages laid down in the Behan case in lieu of the rule of damages laid down by the Supreme Court in the Parish case.

Q. Was there any conflict between the rule laid down by the Supreme Court in the Parish case and the rule laid down by that court in the Behan case?

A. There was no conflict, but there was a difference.

Q. Mr. Brookshire, you have stated that Mr. Parish never referred you to Mr. Holmes Conrad and suggested that you call upon him?

A. I have no memory of it whatever.

Q. You did call upon Mr. Conrad three times, did you not, in his office?

A. Only twice, I think.

Q. Three times you called—it is your statement and not mine. What was the object of your calling to see him?

A. Mr. Conrad?

Q. You had no personal acquaintance with him, did you?

A. My object in calling the first time was to state to you what services had been performed in the Parish case by Mr. McGowan, Mr. Morey and myself. I felt that we had performed just and honorable services, extending over a large period of time, and that we were entitled to consideration in the case, and that I would come and tell you briefly what we had done.

Q. Did you ever make a statement to me of services, or of any services, rendered by you.

A. Yes, sir; yes sir.

Q. Mr. Brookshire, did you not come to my office the first time, to tell me that I had mistaken the remedy; that you had examined into the question of mandamus and you knew it would not lie, but that you did have a remedy which you thought would be effective and I asked you what that remedy was and you declined to tell me; and you walked to my book shelves and pulled down a volume of United States Reports and begun to look in the volume and presently said, with a startled air, "Why you have examined this case," and you handed me the book and pointed to a lead pencil mark on the margin, and I told you I had examined the case. Do you recall that?

A. That was not the first conference I had with you Mr. Conrad; that was the last conversation I had. That was the last conversation—the conversation after the decision in the Court of Appeals.

(The question was repeated by the stenographer as follows) :

By Mr. CONRAD :

"Q. Mr. Brookshire, did you not come to my office the first time, to tell me that I had mistaken the remedy; that you had examined into the question of mandamus and you knew it would not lie, but that you did have a remedy which you thought would be effective and I asked you what the remedy was and you declined to tell me; and you walked to my book shelves and pulled down a volume of United States Reports and begun to look in the volume and presently said, with a startled air, 'Why you have examined this case,' and you handed me the book and pointed to a lead pencil mark on the margin, and I told you I had examined the case. Do you recall that?"

A. There are so many questions involved in that, that I can't answer it.

Mr. DARLINGTON: Take one part of it at a time. I submit that the question should be asked separately, or read and answered in sections.

The WITNESS: If it is separated, I will have no difficulty in answering it.

(The stenographer read the questions in sections, as follows) :

By Mr. CONRAD :

"Q. Mr. Brookshire, did you not come to my office the first time, to tell me that I had mistaken the remedy?"

A. I did not; no.

"Q. That you had examined into the question of mandamus and you knew it would not lie?"

A. I answer no to that question.

"Q. But that you did have a remedy which you thought would be effective and I asked you what that remedy was and you declined to tell me?"

A. This conversation to which you refer, Mr. Conrad, was the last time I was in your office. That was after the decision in the Court of Appeals. I did not say that mandamus was not the proper remedy. I did say that I thought a suit possibly might be maintained in the Court of Claims if mandamus failed. When we were discussing the question, I asked you if you had examined the De Groot case in 5 Wallace, and you walked to the book case and took down and looked at the case and said yes, you were familiar with the case. That was the only case ever examined in my presence, in your office.

77 Q. Mr. Brookshire, did you not on three several occasions, in my office, say to me that the remedy of mandamus was one that you had given consideration to and that it was an inappropriate remedy and would not lie?

A. I did not.

Q. You state that you did not make three visits to my office.

A. I only remember, Mr. Conrad, of two.

Q. I never invited you to come there; did I?

A. No; I don't think you did.

Q. Did I ever have a discussion with you, or engage in any discussion with you upon this case, or any legal feature of it?

A. Why, no further than I have stated, as I remember.

Q. Did you ever offer me, or inform me for one moment, directly or indirectly, that you were counsel in this case or had been?

A. Yes, the first time I called on you.

Mr. CONRAD: Never in your life: I never heard of your being in this case.

Mr. DARLINGTON: I must object to that form of contradiction of the witness.

By Mr. CONRAD:

Q. Mr. Brookshire, did you ever, at any visit, offer your services and association with Mr. Robinson and myself in this suit?

A. Why, Mr. Conrad, I did not feel that I could offer myself in the case. I came there, believing that you would think that the balance found due by the Auditor for the War Department, was an asset that we had aided in creating and that you would at least treat me with courtesy and perhaps solicit my cooperation when you knew that fact, as Cole & Donaldson had, I am informed, on a previous date.

Q. You attended all the hearings in this case before Judge Anderson and in the Court of Appeals, did you not?

A. I heard your argument before Judge Anderson and also heard your argument in the Court of Appeals. I did not hear your argument in the Supreme Court of the United States.

Q. And the only time, you say, that you ever indicated to me that you were counsel in this matter was on your first visit to my office?

A. Well, I think—in fact I know that during the second trip I also referred to the fact——

Q. (Interrupting.) You don't remember that now, do you?

Mr. DARLINGTON: One moment. Let him answer the question. (The question was read by the stenographer as follows:)

“Q. And the only time, you say, that you ever indicated to me that you were counsel in this matter was on your first visit to my office?”

A. Well, I think—in fact I know that during the second trip I also referred to the fact that I had performed services in the case. And I also said to you, Mr. Conrad when I went to see you, that I hoped you would be successful in your mandamus proceedings in the Supreme Court, after you had appealed your case to the Supreme Court.

78 Mr. CONRAD: I have no further questions to ask.

Redirect examination.

By Mr. DARLINGTON:

Q. There is one branch of Major Conrad's lengthy question which I think you have not answered, Mr. Brookshire, and that is that he asked you what remedy you had in mind and you declined to state it. What is your recollection about that?

A. I don't recall anything about it.

Q. What was the remedy you had in mind at that time if mandamus failed?

A. Why, after the failure, that is after the adverse decisions of the two courts—Judge Anderson's decision and the decision in the Court of Appeals—I thought it was possible that a suit might be maintained or, rather, that the Court of Claims might entertain jurisdiction.

Q. Under the Medbury decision?

A. Under the Medbury decision.

Q. Had you any secrecy about that?

A. None at all.

Mr. DARLINGTON: That is all.

ELIJAH V. BROOKSHIRE.

Subscribed and sworn to before me this fourth day of April, A. D. 1910.

E. L. WHITE,
Examiner in Chancery.

It is stipulated between counsel that the petition for mandamus referred to in the testimony, was filed in the Supreme Court of the District of Columbia on the 2nd day of May, 1906.

It is further stipulated that the transcript of the record in the Supreme Court, October Term, 1908, No. 111, in the case of United States, ex rel. Emily E. Parish, Executrix of Joseph W. Parish, Plaintiff in Error, vs. George B. Cortelyou, Secretary of the Treasury, may be read by counsel, or any part thereof, at any hearing he may desire.

(Thereupon, at 5:50 o'clock p. m. an adjournment was taken until Wednesday, March 23, 1910, at 3 o'clock p. m.)

E. L. WHITE,
Examiner in Chancery.

WASHINGTON, D. C., March 23, 1910—

Wednesday, at 3 o'clock p. m.

Met, pursuant to adjournment, at the office of Messrs. Nathaniel Wilson and Clarence R. Wilson in the Pacific Building.

Present on behalf of the plaintiff McGowan, Messrs. Nathaniel Wilson and Clarence R. Wilson.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

A. RALPH SERVEN, a witness of lawful age, produced by and on behalf of the plaintiffs, being first duly sworn, is examined

79 By Mr. NATHANIEL WILSON:

Q. Please state your name, residence and occupation.

A. A. R. Serven; Washington, D. C.; Attorney at law.

Q. You are engaged in the practice of law in the City of Washington?

A. Yes, sir.

Q. How long have you been practicing law here?

A. Since 1903; beginning with June, 1903. I have practiced law in a private capacity in Washington since about 1894; I do not think there has been a time since 1894 that I have not had some law case in my hands that I was taking care of.

Q. What was your occupation before 1903?

A. I was in the Government service here. I also practiced law in a way.

Q. In what capacity were you in the Government Service.

A. In 1893 I was chief of the division in charge of law matters of the office of the Comptroller of the Currency in the Treasury Department. In June, 1896, I was appointed Chief Examiner of the United States Civil Service Commission.

Q. In June, 1896?

A. Yes. I was appointed June 1, 1896. I served in that position until the President finally accepted my resignation on the 6th day of June, 1903.

Q. Did you know Jonas H. McGowan whose name appears in this case, as one of the plaintiffs?

A. I did; very well. On June 8, 1903, I entered into articles of co-partnership with him for the practice of law in this city.

Q. What was the name of the firm?

A. McGowan & Serven.

Q. Where did you have your office?

A. At 1419 F Street, northeast.

Q. State what interest you have in this suit, either directly or indirectly.

A. I have no interest of any kind in this suit, except I might say that I have what you might term a general interest in seeing that justice should be done. That is to say, I know that Judge McGowan did a great deal of work in the case; he had the case in the office when I went with him and did a great deal of work after I went there.

Q. Did you know Joseph W. Parish?

A. I did.

Q. When and where did you make his acquaintance, if you remember?

A. I made his acquaintance first in Judge McGowan's office, I think, probably about the middle of April, 1903.

Q. At the time you formed your partnership with Mr. McGowan, what was the legislative predicament of the claim that is described in these proceedings?

A. Well, at the time I entered Judge McGowan's firm, the Congress had passed an act, which the President approved, referring the matter to the Secretary of the Treasury with directions to find the amount, if any, due Mr. Parish under the principles of law laid down in the case of *United States vs. Behan*, decided by the Supreme Court of the United States. The matter was then pending before the Secretary of the Treasury and his assistants in connection with that subject. I think at the time I first knew of it, it had just been

referred to the Auditor for the War Department to determine and find the amount due. I should say in that connection—

80 Q. Under the Act of Congress that you have referred to, approved earlier in the year?

A. Yes, the Act was approved in February, 1903.

Q. What were you going to say?

A. I should say that although the President did not accept my resignation until June 6, 1903, it had been in his hands for some time and I had practically left the Government service and was in Judge McGowan's office a part or all of each day from fairly early in April—about the 1st of April, I should say—1903. I there met Mr. Parish in his coming to that office in connection with this case.

Q. What personal knowledge had you of the proceedings in the Treasury Department, after the passage of the Act?

A. From the time I went to Judge McGowan's office, in April, I knew of the preparation there and the typewriting of a great many briefs or memorandums on different points that arose in connection with the matter, and I talked with Judge McGowan very freely about the matter and with Mr. Parish. It was at that time the most active piece of work there was in the office and while, then, I had no part in that work, yet they used to talk it over in my presence and discuss the points generally, and I knew what was being done in connection with it. Judge McGowan, Mr. Parish, Mr. Morey and Mr. Brookshire were in there very frequently—I should say there was never forty-eight hours passed without something being done in connection with this case.

Q. Of your own personal knowledge, in respect of the attention given to the case and to Mr. Parish by Mr. McGowan, and in respect of the attention given to the case by Mr. Parish himself, I will ask you to state what the course of business was and how frequently Mr. Parish was in your office and how frequently you saw him there, while the matter was pending before the Auditor—approximately.

A. I should say that probably almost every day, except Sundays, when Mr. Parish was in town—and I think that he was in town nearly all the time the case was before the Auditor. He was in the office practically every morning about 10 o'clock and sometimes he would be there from an hour to two hours, or two hours and a half. Almost always he would be back again the afternoon and sometimes would stay all the afternoon; and the case was receiving constant attention all of that time. As I said before, I don't think there was ever forty-eight hours passed that there was not something done about it during that whole period of time.

Q. In respect of the formal or informal briefs and memoranda prepared while the case was before the Auditor, what do you know from being in Mr. McGowan's office?

A. I know that a very large number of briefs—sometimes extensive ones and sometimes only a page of typewriting, or a couple of pages—were prepared there during that period, and typewritten. Sometimes the preparation work was done by Mr. Morey and Mr. Brookshire, and sometimes all the preparation was made in that office. It is impossible for me to say how many of those briefs were

prepared, but there was really a vast number of them. I have known
times when two or three different questions were brought up
81 and a memorandum brief prepared on each in a single day
and filed; and it was a constant preparation of arguments to
settle the questions or meet the questions as they arose, in one or
the other of the offices of the Treasury Department, where this case
was being considered, as it went from one office to another.

Q. After the case was submitted to the Auditor for consideration
and after the proceedings before the Auditor, what do you know
of your own personal knowledge of the next stages of its progress?

A. I think it was on July 12 that the Attorney-General handed
down an opinion that I was entitled to take part in pending cases,
and as soon as that opinion was handed down I was permitted to
practice before the Treasury Department and I immediately began
to assist Judge McGowan in his work in connection with this case.
So, that, I should say, for a month and anyway the last month,
probably, that it was pending in the Auditor's office, I frequently
took briefs there and filed them. I think I was there once or twice
with Mr. Morey and assisted in the oral argument on certain points
that came up and I prepared, possibly, little memorandums—perhaps
ten or twelve—on particular points that there were questions about.
I assisted in the final computation of the amount which we thought
ought to be allowed, and I think for about a week I put in a good
deal of my time in figuring, of one kind and another, over the matter.
I was told by Judge Kern of the Law Board of the Auditor's office—
I think the first one that any notice was given to—as to the findings
in the office of the Auditor, and then followed the matter, as far
as I had opportunity, and assisted in it in the Secretary's office.

I am not entirely clear whether the case was first referred to the
Comptroller or the Solicitor of the Treasury after the Auditor made
his findings. I think it went to the Comptroller—I am not quite
sure, but it went to one or the other of them and after he had com-
pleted his examination it was sent to the other one.

I assisted in preparing briefs on certain points that the Comp-
troller proposed, and hunted up authorities and examined the rec-
ords in the court cases as to the facts on some of the points. I re-
member being present and taking part in the argument of one of
the questions that were raised by the Solicitor of the Treasury, and
I prepared and furnished Judge McGowan with material which he
requested me to have ready for him in two or three of the oral
arguments that were had before the different officials. I think per-
haps I had about as close a knowledge of the general atmosphere
of the case at that time as any one present now, except probably Mr.
Morey who was in it all of the time. I was only in it part of the
time, and had my other work about the office to attend to.

Q. The Secretary's final decision, rejecting the claim, was about
the 31st of May, 1904, wasn't it?

A. I believe so.

Q. Up to that time, what were the happenings and what were the
interviews at Mr. McGowan's office with Mr. Parish?

A. I understood that whenever Mr. Parish was in town, he almost made his headquarters there, and he practically did. Mr. Parish was in there practically every day and sometimes he would not leave except simply long enough to get his lunch and then he would come back again. In fact, he made the office his headquarters during all of that time—when he was in Washington.

Q. State, if you know, by whom the Act of Congress which was approved on the 17th day of February, 1903, was actually drafted.

A. It was drafted by Mr. J. H. McGowan, in his office.

Q. What do you know of the relations between Mr. Parish and Mr. McGowan in respect of Mr. Parish's claim as it existed prior to the date of the Auditor's report and prior to the Act of Congress.

A. Why, both Mr. Parish and Judge McGowan——

Mr. ROBINSON: You are asking what he knows prior to the Act of Congress?

Mr. NATHANIEL WILSON: Yes.

Mr. ROBINSON: Before he was in the office?

Mr. NATHANIEL WILSON: Yes; if he knows anything.

Mr. ROBINSON: If he has any knowledge.

Mr. NATHANIEL WILSON: I am speaking of his own knowledge.

A. (Continuing:) —I shall have to explain something I said, in order to answer that question. Both Mr. Parish and Judge McGowan have said to me, at different times, that that case had been in that office——

Mr. CONRAD: Can't you leave out Mr. McGowan and state what Mr. Parish said?

A. (Continuing:) Both said the same thing—it was just to the same effect—one in the presence of the other, and both of them in my presence—that this case had been in that office from back in the early 80's and they have shown papers to me connected with the case that were dated as early as 1882 or '83. There was an earlier case, part of which had been allowed by the Court of Claims, that was settled somewhere in the 80's and this case was for the balance of the original claim. I had been shown all of the original papers—they had a number of them—and Mr. Parish often called my attention particularly to those papers and said Judge McGowan—Mr. Parish has said to me that Judge McGowan had practically been a father to him in this whole matter about this ice case, as well as some other matters, and had been the man he had depended on for many, many years; and the records of the office and book entries, and everything of that kind, show that.

Q. During the time that you have spoken of, after the matter got before the Auditor, who else represented Mr. Parish?

A. Who else besides Judge McGowan?

Q. Yes; who else besides Judge McGowan, Mr. Morey, Mr. Brookshire and Mr. May?

A. The only other person that I know of who had anything to do with the case then was Mr. May. He came into the case I think—I am not sure—but I think he came into the case after the Auditor's

83 findings and well along towards the last end of the consideration of the case in the Treasury Department. There was never anybody else had anything to do with it, that I knew of personally, until after Mr. Parish's death.

Q. The adverse decision by the Secretary was on the 31st of May, I believe, 1904. After that decision was made, what do you know of Mr. McGowan's continuance in the case—what occurred with reference to the further prosecution of the case?

A. Immediately following that there were a good many conferences held at my office—some of them were held elsewhere—between Judge McGowan, Mr. Morey and Mr. Brookshire, with Mr. Parish. I remember I attended some of them and at some although I was not present I was told afterwards what had occurred. I looked up a number of questions in connection with those conferences, and Mr. Parish was frequently in the office. My recollection is that he was in the office just about the same as he had been before that, until he left town—I don't remember if it was in the summer or early fall; I can't tell just what time he left town. I don't just recall, but it seems to me it must have been along in July, I think.

Q. Of 1904?

A. Of 1904. Those conferences were very frequent until close up to the time when Mr. Parish or Judge McGowan left town. I have forgotten which it was left town first.

Q. I am speaking now of the summer of 1904, and what occurred after the rejection of the claim by the Secretary on the 31st of May, 1904.

A. Well, there were a good many conferences held that I know of.

Q. What occurred particularly, as fully as you can remember, at the conferences at which you were present and at which Mr. Parish was present and Mr. McGowan?

A. The same questions—some one phase or another—were discussed usually in all of the conferences as I remember them. The conferences were simply for the purpose of discussing ways and means and as to what should next be done in order to collect the amount that had been found due Mr. Parish, and there were three plans that I remember very distinctly, that were discussed and which I tried to look into as carefully as I could; I am sure Judge McGowan did, and think the others did. Mr. Parish urged quite strongly that he had more faith in being able to get something from Congress than he did from the courts, and he seemed to think that was the proper procedure. The rest of us all thought differently, and the questions of what the course should be largely went along two lines as I recall. One was the question of whether it would be possible to bring a suit against the Secretary of the Treasury, for the amount that the Auditor had found, in the Court of Claims under the general jurisdiction of that court and determine the status of the claim under the statute. The other one was the question of mandamus. Those two questions were questions that the lawyers in the case discussed principally. Mr. Parish, as I said, did not know what the courts would do, but he thought he could get Congress to do what he wanted them to do, and he was quite insistent part of the time that the

whole matter should go back to Congress and he would get his relief there.

84 Q. When did Mr. McGowan leave town that summer—approximately?

A. 1904?

Q. 1904; after this decision by the Secretary.

A. My recollection is that in 1904—it was considerably after the 1st of July and I should say about the middle of July, and from that on up to the 20th somewhere; it was along in there. I know that he stayed at the office considerably later than he intended to, on account of this case.

Q. Where did he go at that time.

A. I think in 1904—I think that was the first summer he went to Dudley, Ontario; I think that is right.

Q. When he left town, what was the condition of the claim? What, if any, plan of operation for the prosecution of the claim had been determined upon?

A. There was a sort of a final conference, I think a few days before—

Mr. CONRAD: Before what?

The WITNESS: Before he left.

A. (Continuing:) I may be mistaken about that. It was either just before Judge McGowan left or just before Mr. Parish left, if he left before Judge McGowan did; I don't know—I don't recall that, but which ever it was—looking to the separation for the summer, a conference was held at which different things were discussed and it was finally decided to let things go over until in the fall and then finally determine what should be done from that time on.

By Mr. NATHANIEL WILSON:

Q. We have been served with notice by counsel for the defendants to produce certain papers, as follows:

“Nathaniel Wilson, Esq., Attorney for the Estate of Jonas H. McGowan.

“SIR: You are hereby notified and requested to produce at the earliest practicable moment, during the taking of the testimony in this case on behalf of the complainants, the original letter from Joseph W. Parish to J. H. McGowan, dated Washington, D. C., September 1, 1904, and addressed to the Hon. J. H. McGowan, Dudley, Ontario, Canada. The letter here called for begins as follows, namely:

‘Yours of the 22d ult. received in due time and contents noted.’

“You are further requested to produce the original letter from Mr. J. W. Parish to Mr. McGowan, dated September 18, 1904, and addressed to the said McGowan at Dudley, Ontario, Canada, and beginning as above recited.

Yours, very truly,

Counsel for the Defendants.

“March 22, 1910.”

Will you please state if you have made search for the letters that are mentioned in that notice.

A. I have; yes.

Q. And if so, what have you found?

A. I do not find any letters of those two dates, but I produced and I think I handed them to you—I found one letter of August 16, 1904, from Mr. Parish, and I found a letter of September 15, 1904. I got everything there was near those dates. The letter of September 15th begins: "Your letter of the 25th ult. received in due time and contents noted."

Mr. CONRAD: Not the 27th?

The WITNESS: I thought that resembled what you called for and that the date was probably a mistake of Mr. Parish.

Mr. CONRAD: This letter of August 16th is the one to which that letter is a reply, and Parish's letter of the 16th requests the return to him of the power of attorney he had given McGowan. Then this letter of September 15th is an acknowledgment of that.

Mr. NATHANIEL WILSON: I offer these letters in evidence.

(The papers so offered are marked "Plaintiff's Exhibits, M. & B. Nos. 11, 12 and 13, and are as follows:)

WASHINGTON, D. C., August 16, 1904.

"Hon. J. H. McGowan.

MY DEAR SIR & FRIEND: I have reached a point where it has become absolutely necessary for me to raise some money. The only asset I have as you know is my claim. If I am given a free hand I have good prospects of raising sufficient money to meet pressing demand at a reasonable cost. I would therefore ask that you return me the power of attorney which I gave you in my case. I make this request with no thought of not paying you for your services rendered and money advanced as soon as the claim is paid. I am to blame in not remaining in Washington when the Auditor signed report in my case and cause immediate action of officials as of yore, a rule I have proved in the past.

I am your truly,

J. W. PARISH.

P. S.—I am glad your health is improving."

"DUDLEY, ONT., CAN., Aug. 21, '04.

"DEAR PARISH: Of course I do not have the power of attorney with me, but you may make any arrangement for a loan that you deem best.

"My recollection is that the last power of attorney you gave me was in blank and that I wrote in the name of another party, and may have delivered it. I hope to be back before a great while.

Truly yours,

J. H. MCGOWAN,"

"COMMITTEE ON CLAIMS,
HOUSE OF REPRESENTATIVES, U. S.,
WASHINGTON, D. C., Sept. 15, '04.

Hon. J. H. McGowan.

MY DEAR SIR AND FRIEND: Your letter of 25th ult. received in due time and contents noted, which I answered best I could but have no answer thus far to hand and will repeat in substance I wrote, to wit: You will remember before you left Washington for your summer respite, you said substantially that you had done your best to get Auditor's report in my case paid by the Secretary of the Treasury and failed, etc., "that you turned over to me the case to be managed in the future and do whatever I deemed best, etc."

Sometime next Congress I propose to organize a practicable method and resurrect the claim from its unfortunate condition and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore I said that I would reimburse those who have advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit: "that you would be glad and well satisfied to get the money advanced me" returned. My past record as to compensation—who had rendered me service you have not surely forgotten which was generous and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm, who is doing business here and *and* in New York.

Yours hastily,

J. W. PARISH,
217 A St. S. E."

By Mr. NATHANIEL WILSON:

Q. Are those letters you have produced the only ones you could find about that date?

A. Yes, sir.

Mr. CONRAD: They are evidently the letters.

By Mr. NATHANIEL WILSON:

Q. When did Mr. McGowan return?

A. About the last week in September. As I recall, I think it was just before the 1st of October.

Q. When, after Mr. McGowan's return did you again see Mr. Parish?

A. I did not see Mr. Parish, after Judge McGowan came back, until after Congress met in December. I think it must have been somewhere around. I should say, ten days or two weeks after Congress convened—it was very close to the holidays. I met him near the corner of F and 15th streets and shook hands with him, and I told him we had missed him at the office. He said yes, he had been away a long time and had not been able to get in yet to see Judge McGowan, but that he expected to come in that afternoon and talk over what was going to be done about the ice case. We had a very nice little chat for probably five or six minutes, while we stood there on the corner, and then he went on up the street and that is the last time I ever saw him. I think he died, if my memory serves me

—it seems to me he died within two or three days after I saw him. It was a very short time after that and I was surprised and shocked to learn of his death after having seen him so very recently out on the street.

Q. At that time did you know his daughter?

A. No, sir.

Q. Did you know Grant Parish?

A. No, sir. I have never known them.

Q. Neither of them had been to Mr. McGowan's office?

A. Not to my knowledge; I never saw them there that I know of. I do not know that I ever saw them, unless I saw them in here the other morning.

87 Q. The two letters which you have produced, one dated August 16, 1904, and the other dated September 15, 1904, signed by Mr. Parish—did you see them at the time of their receipt?

A. I think I did. My best recollection is that those letters were delivered at our office and that I opened them and forwarded them to Judge McGowan and asked him what, if anything, he wanted done about them. I know I received one letter of that kind and think it was one of those two letters. My impression is that I received both of them at the office.

Q. What do you know of Mr. McGowan having abandoned the prosecution of the claim, or expressed any willingness or desire to be released of its prosecution, or having declined to go on with the prosecution of the claim?

A. I know that at least in my presence Judge McGowan never expressed any idea of abandoning his contract to prosecute the claim to a finish. I also know that in connection with a suggestion from somewhere—whether it grew out of those letters or something else, I don't know; I don't recall just when it was—but I remember him saying at the time when Mr. Parish or somebody was suggesting that he had better abandon it or, rather, he expressed this opinion: "That after working on it for all these long years, any man who would abandon the case when it was so near the finish of it, certainly must be a fool." He did not usually use that kind of language, and did not use harsh terms very often, but I remember he did at that time make use of this expression.

By Mr. ROBINSON:

Q. Do you remember whether that was said in the presence of Mr. Parish?

A. I don't think so. My impression is that it was after he came back from being away that summer and I made some reference to those matters. He said, "The idea of his abandoning that case. It was perfectly preposterous, after all the years he had worked on it." He said he wouldn't think of doing anything but carrying it through to the finish.

Mr. CONRAD: An exception is noted on behalf of the defendants to any conversation had between this witness and Mr. McGowan, in the absence of Mr. Parish, and a motion will be made to strike out all such testimony at the hearing.

A. (Continuing:) In addition to that, I am sure that at the time Mr. Parish talked with him—the last time he saw him alive—that he knew as well as I did that Judge McGowan never intended to abandon that case. That is the reason he spoke as he did about it.

By Mr. ROBINSON:

Q. You only know what he said?

A. I only knew what he said. I referred to that, and am trying to give the substance of it from the impression it made on me at the time, which was that he had a fixed intention to go on with the case.

Q. You say he said so?

A. Yes. He did not use those words, but that is the effect of what he did say.

88 By Mr. NATHANIEL WILSON:

Q. What did Mr. Parish say then, or at any time, to you, or what did Mr. McGowan say to you in the presence of Mr. Parish, about Grant Parish wanting to dismiss Mr. McGowan from the case, or take the case out of his hands?

A. Both Mr. McGowan and Mr. Parish had several times talked to me about Grant Parish's efforts to get the case into the hands of some other attorneys. Mr. Parish in my office one day said to me that Grant had certain times in every month when he was not quite right in the head; that he had either had a fall or a sunstroke when he was a child, and that in certain phases of the moon his head was always affected and he would do things that he ought not to be held responsible for. He referred to attempts which Grant had made with him and also to attempts of Grant made with the Judge, to make the Judge angry in order to try to get him out of the case. Judge McGowan had told me the same thing—that Grant had tried in every way to get him out of the case; and I am sure that both of them had referred to that in the presence of each other, in their discussions, and I am sure I heard him mention it and I think he commiserated with the Judge over the situation with Grant.

Q. In your last interview with Mr. Parish, shortly before he died, what, if any, expression of dissatisfaction with Mr. McGowan or those associated with him did you hear; and what intention was expressed by Mr. Parish in respect to the future prosecution of the case by them?

A. There was no expression of any dissatisfaction at all. The only thing that I recall to mind—I am not absolutely sure that this was the time he said that, but it seems to me that it was in connection with his coming up to see the Judge that day or the next day to talk things over and finally determine the plan of campaign, and I think he made some reference—I won't be certain about this; I might be mistaken—he said something about Grant's having had some letters written during the summer to Judge McGowan and I think he told me that he had sent them—I am not sure about that—but it comes back to me that something was said about certain let-

ters which he said Grant had written to Judge McGowan to try to get him out of the case. That is the only thing I can recall that in any way looked like dissatisfaction anywhere, about it. And on the other hand—this was about 11 o'clock in the morning and he was coming back either that afternoon or the next day—I think it was that afternoon to arrange with the Judge to go ahead with the case, because, he said, "Congress is already here now, and we have got to go right ahead."

Q. When and from whom did you know, and when and from whom did Judge McGowan know, within your knowledge, of the employment of other counsel in the case?

A. It was, of course, after Mr. Parish's death and I think after the will was probated. There was a will, I think, and my recollection is that after the will was probated Mr. Morey came into the office one day and said that either Judge Cole or Mr. Donaldson, of Cole & Donaldson, had stopped him on the street—I think he said it was on the street—and told him that the executrix or Grant Parish had been to see them about taking up this case; and that it had developed that Judge McGowan, Mr. Brookshire, and Mr. Morey were in the case and he wanted to talk things over about it. I can't tell just when that was, but I remember Mr. Morey coming into the office and telling about that. I should judge it was probably the latter part of January or the 1st of February. It was a while after Mr. Parish's death.

Q. When and from whom did you learn of Mr. Conrad and Mr. Robinson having been retained in the case?

A. My recollection is that after Judge Cole's death we were informed that that firm was no longer counsel—that the ice case had been taken away from them. It seems to me that it was not long after Judge Cole's death, and possibly it was three or four months after that. I do not remember. It seems to me it might have been three or four months, or it might have been longer than that—I am not sure just when it was—but it was some little time, I think, before Major Conrad had anything to do with it.

Q. What if any information or notice did Mr. McGowan, to your knowledge, receive from Mr. Conrad or Mr. Robinson, of their employment in the case?

A. As far as I have any knowledge, I do not think he received any notice whatever. I know that Judge McGowan spoke about it and seemed to feel rather deeply on the subject. He stated that it was impossible for any lawyers to take up that case without knowing of his connection with it and it seemed to him that the matter of professional courtesy would require some investigation of his relations with the case. I remember his talking along that line, and he seemed to feel pretty deeply about it. I think he expected something from those gentlemen, from what he said, but I do not think he ever received anything.

Q. What do you know of your own personal knowledge, of the attitude and willingness on the part of Judge McGowan to continue the prosecution of the case after the death of Mr. Parish?

A. So far as I ever heard him express any opinion about the

matter, he apparently had the same opinion after Mr. Parish's death that he did before: That there was not any reason at all, unless Mr. Parish's legal representatives had some personal reason which had nothing to do with business—that there was not any reason at all why he should not have continued and been continued in the case after Mr. Parish's death the same as he had been before. And I know that he stood ready, as long as he lived, to do anything—and would have done it had he been given the opportunity to do it—in connection with the further prosecution of the case.

Q. When did Mr. McGowan die?

A. The 5th day of July, 1909.

Q. What was Grant Parish's business here in Washington, if you know, during the time intervening between the passage of the act and the final action of the Secretary of the Treasury?

A. My impression is that at that time he was advertising farms and real estate for sale. I never knew that he ever had any other business in Washington.

Q. Do you know of any other member of the family—any other children of J. W. Parish?

90 A. I knew Jim Parish. He was, I believe, an older brother of Grant's. I am not sure which was the older, but I had the impression that Jim was the older.

Q. Where did he reside?

A. I think he was residing in Milwaukee at the time I knew him. I think he has since deceased. I do not know whether he died there or not.

Q. What had he to do with the prosecution of the case, advising with Mr. McGowan in relation to his father's interests?

A. I think when Judge McGowan was in Congress, Jim Parish had been a stenographer—he had done some work for him, and I think later had been employed in the Judge's office, and their relations were very friendly. Jim Parish, through correspondence had kept fairly closely in touch with the progress of this case, and I have seen a number of letters from him inquiring about it. Occasionally, he would come into the office, whenever he was in this part of the country, and talk over things. Sometimes he was with his father, and sometimes he would come in alone. He was in the office twice during the summer of 1904, after the decision of the Secretary of the Treasury—during that summer and fall—and once about two weeks before Judge McGowan came back from Dudley, Ontario. I remember getting a telegram addressed to the Judge asking him to be sure and be in the office the next day, as he wanted to talk things over, with him. I should say it was very close to the 1st of September, possibly a little after the 1st. The Judge was not there, and he talked with me and he said he had wanted to see the Judge; that he had recently talked with his father, and his father had told him he had sent a letter to the Judge which Grant had prepared for him or dictated to him—something of that kind—about the Judge's getting out of this case. Jim wanted me to say particularly to the Judge that it was some more of Grant's foolishness and that his father had not meant anything by it at all,

and he wanted to be sure that the Judge would understand it. He said he wanted to talk things over with the Judge and see what the prospects were and what the Judge thought was the best thing to be done next. Of course the Judge was not there and he asked me, as closely as I could, to tell him when he would be back. He said he was going south and expected to be gone two or three weeks and if I thought the Judge would return by that time, he would stop up there to see him. I got out one of the Judge's letters and told him when I expected the Judge back. About three weeks later the Jim came in again and was there about two hours talking over the Judge was back—I think he had just been back a day or two—and situation. Part of the time I was there, and part of the time I was not; but the whole of that conversation was planning what should be done in the fall and what was the next best way to tackle the case to get the earliest result possible. I remember that the two letters that had been written that summer to Judge McGowan by Mr. Parish were referred to, and Jim Parish made the statement that his father told him they were simply written to please Grant, and that was all there was about it.

Mr. CONRAD: I want to note an exception on behalf of the defendants to the above conversation, or to any conversation had between the witness and James Parish, in the absence of
91 Joseph W. Parish, and I shall move to strike out all such testimony at the hearing.

The WITNESS: This conversation illustrates how close a watch Jim Parish had on the case.

By Mr. NATHANIEL WILSON:

Q. You have spoken of the preparations that were made for the presentation of the case to the Auditor and of its consideration by him. With reference to the amount claimed by Mr. Parish, will you state whether in any of your briefs, and, if so, in what brief, there was any careful and exact computation made, and by whom and how it was made.

A. There was such computation made and the briefs—a brief, I will say, on that particular point, of the amount actually due to Mr. Parish was filed. The brief went into the computation very carefully. I have seen the brief, and Judge Kern of the Law Board of the Auditor's office talked with me about it. And when he told me that the Auditor had made the allowance he said, "We have allowed you every cent you claimed in that paper, just exactly as you claimed it."

Q. And that brief was filed in the Auditor's office.

A. That brief was filed in the Auditor's office. In the preparation of those figures, my recollection is that Mr. Morey's office did some of the figuring on that and I know the Judge and I did considerable on it. I did much more than the Judge did, and I think that in preparing it I probably must have put in a considerable part of my time for a week, checking it back and forth and correcting it in every way I knew how.

Mr. CONRAD: We have no cross-examination.

A. R. SWANE.

Subscribed and sworn to before me this sixth day of April, A. D. 1910.

E. L. WHITE,
Examiner in Chancery.

Mr. ROBINSON: I desire to state on the record that the original agreement with Major Conrad and myself in connection with our employment in the ice claim, which was called for at the last hearing has been lost or mislaid and we cannot, therefore, produce it. We have a second agreement which was made after the original disappeared, however, which will be produced if counsel desires.

Mr. NATHANIEL WILSON: If you can furnish us with the date of the first agreement, that will be all we desire.

Mr. ROBINSON: We will try to do that.

(Thereupon, at 4:30 o'clock, p. m., the hearing was adjourned until Friday, March 25, 1910, at 10:30 o'clock, A. M.)

E. L. WHITE,
Examiner in Chancery.

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WASHINGTON, D. C., Friday, March 25, 1911—

10:30 o'clock a. m.

Met, pursuant to adjournment, at the offices of Messrs. Nathaniel Wilson and Clarence R. Wilson, in the Pacific Building.

Present on behalf of the plaintiff McGowan, Messrs. Nathaniel Wilson and Clarence R. Wilson.

Present on behalf of the Plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Present, also, the defendant, Emily E. Parish.

Whereupon R. GOLDEN DONALDSON, a witness produced by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. DARLINGTON:

Q. Please state your full name and occupation.

A. R. Golden Donaldson; lawyer.

Q. Are you the surviving member of the late firm of Cole & Donaldson?

A. I am, yes.

Q. Mr. Morey has testified in this case about an interview between him and you at which it was suggested by you that he write a letter to your firm in regard to the relations of Messrs. McGowan and Brookshire in reference to an ice claim of the late Joseph W. Parish against the Government. Do you recall that conversation?

A. I am sorry to say that I do not recall the conversation to which Mr. Morey refers.

Q. He also states that a letter was addressed to your firm by Mr. McGowan, Mr. Brookshire and Mr. Morey in regard to that matter. Do you recall that letter?

A. Up to yesterday, I could not recall it. Yesterday afternoon I went over our letter files and I found a letter written by Judge Cole and sent to Mr. Grant Parish, under date of February 7, 1905, which has somewhat refreshed my recollection. I recall now that there was a letter sent us by Messrs. McGowan, Brookshire and Morey, but I can't recall the nature of it; nor can I recall any interview that I had with Mr. Morley or anybody else which led to the sending of it.

Q. At the time of your firm, Mr. Donaldson, had you in your possession any letters, papers or correspondence relative to this ice claim?

A. We had some papers in our possession; yes.

Q. What became of them?

A. After the death of Judge Cole, which occurred on the 17th of March, 1905, I turned everything we had in the office over to Mr. Jesse E. Potbury.

Q. What was his connection with it?

A. My understanding was that he was counsel in the case. I think it was he who first brought the matter to our attention.

Q. Mr. Potbury hands me a letter signed by Mr. Brookshire, Mr. Morey and Mr. McGowan and I will ask you to see if that paper refreshes your recollection at all on the subject of the letter in question (handing witness paper)?

A. (After examination). This does not refresh my recollection of having received the letter. When I saw this yesterday—not this but a copy of it—I thought my recollection was refreshed to the extent that I remembered that Mr. Morey had some connection with it; but I cannot recall receiving this letter.

Q. Will you kindly tell us what connection either your firm or yourself had with this ice claim?

A. My recollection is that Mr. Potbury came in to see us in relation to the matter and at that time both Judge Cole and myself were exceedingly pressed in some cases that were pending in court. No definite arrangements had been entered into with either Mr. Potbury or any of the Parish family in relation to the prosecution of the ice claim, but we had gone so far as to present a petition in the Probate Court for the probate of Mr. Parish's will, I think before any definite arrangement was made Judge Cole died.

Q. What members of the Parish family saw you in connection with the matter?

A. It seems to me I recall having seen Mr. Grant Parish.

Q. Where and how frequently?

A. I saw him at our office, which was then in the Century Building on 5th Street. I can't recall having seen him but once.

Q. Did you at that time see Miss Parish?

A. I do not recollect whether I saw her.

Q. Have you brought with you the copy of Judge Cole's letter to Mr. Grant Parish of which you have spoken?

A. Yes (producing paper). The copy which I have just handed you is a copy of the letter written by Judge Cole personally to Mr. Grant Parish in answer to a letter which Mr. Parish wrote us on February 2, 1905.

Q. Do you know where that letter is?

A. I have searched for it in our files—I have in my possession the office files of the late firm of Cole & Donaldson from the time of its inception until Judge Cole's death, and I have searched through these files and the files since then, which contain all the correspondence in reference to matters pertaining to the office and I have been unable to find any letter in either of those files, either to Mr. Potbury or the Parish family. The only letter I could find was the one a copy of which I have just handed you.

Q. You say you turned over to Mr. Potbury such papers as you had in your office.

A. Shortly after Judge Cole's death, I turned over to Mr. Potbury everything, I think, we had in connection with the entire matter.

Mr. DARLINGTON: I want to offer in evidence this letter of February 7, 1905, and also the letter of Messrs. McGowan, Morey and Brookshire, after they have been identified by Mr. Potbury as having been received by him from Cole & Donaldson.

The WITNESS: I might say that the initials in the corner, on the copy of the letter I have just handed you, "C. C. C." and "C. M. J.," were put there in pursuance with the practice in the office at that time. They indicate that the letter was dictated by Judge Cole and typewritten by C. M. Joyce who was a stenographer in our office at that time.

94 Cross-examination.

By Mr. ROBINSON:

Q. Can you recall any conversation which you ever had with Mr. Morey about this claim of Mr. Parish's?

A. I have been unable to recall any conversation which I had with Mr. Morey. I have tried to recall it, but could think of nothing to fix in my mind.

Q. Did you ever meet Mr. Morey on any occasion?

A. I remember having met Mr. Morey on one occasion; but that has not been so very long ago. I met him going home one evening on the street car, and I talked just a little with him about the case. If I recall correctly what he did say, I think he said, "We had an interest in that case, you remember."

Q. And by "we," whom did you understand he meant?

A. Well, I don't know that I understood who was meant by "we," but I thought Mr. Morey was referring to himself and his associates, and not to me as an attorney.

Q. Now, did you ever have any conversation with Mr. McGowan about this case?

A. No sir. I never saw Mr. McGowan in relation to it at all; not at any time.

Q. Did you know Mr. McGowan?

A. I don't think I did, sir.

Mr. DARLINGTON: Of course I want to object to this as not responsive to anything brought out in the direct examination of the witness.

By Mr. ROBINSON:

Q. Did you ever have any conversation with Mr. Brookshire about this case?

A. I don't recall having any conversation, either with Mr. McGowan or Mr. Brookshire, about the matter at all.

Q. Did you know that Mr. McGowan and Mr. Brookshire were attorneys for Mr. Parish?

A. If I were asked that question without that letter before me which Mr. Darlington showed me this morning, I would answer no. But since that letter has been placed before me, I cannot answer no because when I examine this letter which was sent to Mr. Grant Parish by Judge Cole it seems to me our attention must have been brought to it in some way. The thing occurred five years ago and I regard myself as entirely out of the case, and I have not had any need to remember what were any of the details in relation to it.

Q. Of course that letter refers us to another letter. Did you know Mr. McGowan and Mr. Brookshire were ever connected with the prosecution of the ice claim of Mr. J. W. Parish?

A. Well, I really do not know what connection Mr. McGowan and Mr. Brookshire had in the matter; I really do not know.

Q. You do not know of any.

A. I do not know of what if any, connection they had.

Q. Mr. Donaldson, this testimony has been given by Mr. Morey: "Shortly after the death of Mr. Parish I met R. Golden Donaldson of the firm of Cole & Donaldson on the street, and he informed me that his firm had been retained by Miss Parish, as executrix, and stated that he would like to have a conference between Mr. McGowan, Mr. Brookshire and myself and his firm looking to our location in the case. He suggested that we write a letter to his firm asking for an appointment and stated that an appointment would be arranged when we would have a conference and arrange for ourselves in the case in connection with its further prosecution."

Do you recall such conversation?

Mr. DARLINGTON: Is it agreed that counsel are now making the witness their own?

Mr. ROBINSON: No.

Mr. DARLINGTON: The fact is so obvious and must be so well known to counsel, that an objection ought not be necessary. I am quite willing, however, for the convenience of the witness that counsel for the defendants may make him their witness and take his testimony at this time; but unless that is agreed, I shall move to strike out any answer given along this line of examination.

By Mr. ROBINSON:

Q. Do you remember such a conversation, at all?

A. I cannot recall such a conversation. I simply have no recollection on the subject, and I can't say that I did nor that I did not talk with him about it. I simply have no recollection whatever about the matter.

Q. Do you think you could have asked him to write you a letter on such a subject without remembering it?

Mr. DARLINGTON: I object to that question as not cross-examination. It is calling for a hypothetical or contingent conclusion of the witness.

By Mr. ROBINSON:

Q. Do you think you could have invited such a letter to be written and have entirely forgotten it?

A. Well, I do not want to be a judge of my own powers of recollection. I would say that it would depend altogether on the circumstances in a given case whether I would ask a brother lawyer at the bar to write such a letter. I can only say that I have no recollection whatever about having had that conversation.

Q. Now, here is another statement, by Mr. Brookshire.

"On the 26th day of December, 1904, Mr. Parish died. Soon thereafter, Mr. McGowan stated that he had met Mr. Golden Donaldson on the street"—

And then, after some interruptions—

"and he stated that the firm of Cole & Donaldson would entertain a letter from us with a view of having a meeting for the purpose of arranging for us in the case."

Do you recall that conversation?

A. No sir.

Q. I think I understand you to say you never had any conversation with Mr. McGowan?

A. I can't recollect ever having spoken to Mr. McGowan on the subject.

Mr. DARLINGTON: I believe that is a clerical error in the testimony. I think it should be Mr. Morey; not Mr. McGowan.

96 By Mr. ROBINSON:

Q. It has been testified to, though. Tell us whether you ever had such a conversation.

Mr. CONRAD: The name McGowan there should be Morey.

By Mr. ROBINSON:

Q. Under what circumstances did you retire from such part as you had in the case of Mr. Parish, as you stated?

A. As I recollect the matter, the personal equation of Judge Cole entered very largely into the employment of our firm in the matter. After Judge Cole's death, I think Mr. Potbury spoke to me, or I spoke to him—I don't remember which—but in any event I suggested my entire willingness to permit the parties to have other counsel if they so desired; and as a result of that, I think all the papers were turned over to Mr. Potbury.

Q. Had they been received from him in the first instance—such papers as you had?

A. I can't recall just what papers we had. I know that some papers had been handed over to our firm in the matter, but the

matter was just in an embryo state and I can't recall just what we received, but whatever papers we did receive came from Mr. Potbury.

Q. Did you have any differences or disagreement of any kind with Miss Emily E. Parish, or her brother Grant Parish?

A. I don't recollect having any.

Q. Your relations with them were entirely amicable so far as you had any?

A. Oh, yes, Mr. Robinson. As I say, we were just on the threshold of the case. I don't think that we had gone so far as to make any definite arrangement and I know we never made any contract with them for such services as we should perform and any compensation which we were to receive. And Judge Cole's death intervening, the papers in connection with the matter were returned to Mr. Potbury; everything in the office having been received from him originally.

Q. And you think that any communication you received you turned over to Mr. Potbury; if you had any?

A. Well, I don't recollect: My recollection is, now, that whatever we had in the office in the way of papers relating to the case, if we had any such papers, were received from Mr. Potbury, and if I had any correspondence, my recollection is that it was given to him together with such papers and that we had nothing in the office then relating to the matter except the copy of the letter which I offered this morning.

Redirect examination.

By Mr. DARLINGTON:

Q. Mr. Donaldson, you were asked if your relations with Grant Parish and Miss Parish were amicable. What intercourse of any kind have you had with Miss Parish?

A. I don't recall ever knowing — come in contact with Miss Parish in the matter.

Q. Who had been the instrumentality of communication
97 with you on behalf of the Parish family?

A. My recollection is that Grant Parish is the only one who saw us, Mr. Darlington, about the matter. I do not recall any conversation with Miss Parish, but I do recall having met Grant Parish in relation to the matter at the office. That is the only thing I recall.

Q. Now, you have been asked whether you think you could have requested, or would have requested the writing of such a letter as that of Mr. McGowan, Mr. Morey and Mr. Brookshire to your firm of January 31, 1905, and replied that it would depend on circumstances. Suppose at that time you were aware of the fact that the ice claim of the late of Mr. Parish had been prosecuted by those gentlemen through the courts and through the departments to such a stage that nothing remained but the payment of the money—that nothing remained for the officers of the Government to do but pay over the money—and that the fund had thus been created or realized up to the point of payment by other members of the profession and

you were then called upon to take the matter up at that point and go on with it: What can you say as to whether or not you would have requested or invited communication with the gentlemen who had done this work if those facts were then in your mind?

A. Well, if those facts were then in my mind, I don't see how it would be possible for me to take up any case without consulting the other counsel before engaging in it.

Recross-examination.

By Mr. ROBINSON:

Q. If those facts were in your mind or such facts had existed, would you not have remembered it?

A. I should say, Mr. Robinson, that I have been awfully busy since then trying to make both ends meet and so many things have occurred that I can't really recollect.

Q. Let me ask you this: Does your knowledge of the case, as far as you went, enable you to know that it advanced so far that nothing remained but paying over the money; that that was all that had to be done—to receive it?

A. I have no personal knowledge of what the situation or the condition of the case was. As I now recollect the condition as then given to us, the claim was with the Secretary of War.

Q. The Secretary of the Treasury, if you will permit me to correct you.

A. My present recollection of what the condition then was is that a report had been sent to the Secretary of the Treasury. But I understood that the report had been made by somebody in the War Department and had then been sent to the Secretary of the Treasury and that the report recommended the payment of the claim. The Secretary of the Treasury had for some reason reversed that report and sent it back to the War Department, and that was the condition of it. Now, that is my present recollection of what was told me at that time as the then condition of the claim. I had no personal knowledge of it and never examined any records at either the War or the Treasury Department.

98 Q. Do you remember who told you that, Mr. Donaldson?

A. I can't recall who did tell me that. That is simply the impression I have now, that that was the condition of the case. I know I talked to Mr. Potbury and Mr. Parish, but I can't say which, if either of them, told me.

R. GOLDEN DONALDSON.

Subscribed and sworn to before me this sixth day of April, A. D. 1910.

E. L. WHITE,
Examiner in Chancery.

JESSE E. POTBURY, a witness of lawful age, produced by and on behalf of the plaintiffs, being first duly sworn, is examined

By Mr. DARLINGTON:

Q. Give us your full name and occupation?

A. Jesse E. Potbury; attorney at law.

Q. Mr. Donaldson, the last witness, states that he handed to you certain papers which were in his possession, or the possession of the firm of Cole & Donaldson, relating to the Parish ice claim. Do you recall receiving such papers?

A. I do.

Q. Will you please produce such papers which you have?

A. The papers received from Mr. Donaldson and which I gave to Mr. Donaldson, consist of the a copy of a report of the Auditor of the Treasury Mr. Tracewell, dated January 21, 1904; a copy of the opinion of Secretary Shaw, dated May 31, 1904, and a copy of the contract between Henry Johnson and Joseph W. Parish & Company, dated March 5, 1863. And it might have been that Mr. Donaldson had a copy of my opinion, dated August 8, 1904, given to Joseph W. Parish. Those are practically all the papers given to Mr. Donaldson by me, and returned by him to me.

Q. You refer to Mr. Tracewell as the Auditor. Was that his office?

A. It was.

Q. Auditor?

A. Comptroller of the Currency.

Q. What other papers, if any, did Mr. Donaldson give you?

A. Mr. Donaldson turned over to me before that time I think, a certain letter received from Messrs. McGowan, Morey and Brookshire.

Q. Give us the date, please.

A. That is the letter dated January 31, 1905. If I remember correctly, the envelope was addressed to Judge C. C. Cole, and Mr. Donaldson either handed it to me or showed it to me upon its receipt. Whether he kept this letter among the papers until he finally delivered them to me or not, I don't remember.

Q. What if anything did you do in pursuance with that letter when he showed it to you?

A. If I remember correctly, I had a talk with Mr. Donaldson and the matter lay in status quo then until it could be decided what to do.

Q. Did you communicate the contents of that letter to any one?

A. I did not.

99 Mr. DARLINGTON: I offer this letter in evidence.

Mr. ROBINSON: Is that the same one we have already seen?

Mr. DARLINGTON: Yes.

A. (Continuing:) I can answer that question further. You asked me if I communicated with any one. I either showed the letter or communicated its contents to Mr. Grant Parish.

Mr. DARLINGTON: I also offer at this point, gentlemen, the letter of Judge Cole to Grant Parish, or the copy of it. Of course if you have the original of it, it can take its place.

(The papers so offered in evidence are marked "Plaintiffs'" Exhibits M. & B. Nos. 14 and 15, and are as follows:)

January 31, 1910.

Messrs. Cole and Donaldson and Jesse E. Potbury, Attorneys at Law,
Washington, D. C.

"GENTLEMEN: Having learned from the court records that you have filed a will of Joseph W. Parish, and have made application for the probate of the same and asked for the appointment of Miss Emily Parish executrix thereunder, we would respectfully ask, owing to the fact that we have also placed a will on file and hold contracts with, and powers of attorney from, Mr. Parish for the collection of his Ice Claim that we may have a conference with you touching matters affecting said estate. If agreeable, let the time and place suit your convenience.

"We remain, gentlemen,

"Faithfully yours,

"J. H. MCGOWAN.

"E. P. MOREY.

"E. V. BROOKSHIRE."

February 7, 1905.

Grant Parish, Esq., 1429 New York Avenue, City.

"DEAR SIR: I have yours of February 2nd. I am very much engaged at present and will be unable to see you and your sister for about a week, when I will fix a time. I note what you say about an interview with Mrs. McGowan and others. We will enter into no arrangement with them without first consulting you.

Very truly yours,

CCC/CMJ."

By Mr. DARLINGTON:

Q. Please let us have any other letters Mr. Donaldson turned over to you.

A. (Handing papers to Mr. Darlington.)

Q. The witness has handed me three letters, one dated February 2, 1905, addressed to Judge C. C. Cole, and signed "Grant Parish" in typewriting. Do you know whether Grant Parish was in the habit of signing his name in typewriting?

A. He was. I received letters from him signed that way.

Q. The other letters handed me appear to have been addressed to you. Did they come to you from Mr. Donaldson?

A. No; from Mr. Parish direct.

100 Mr. DARLINGTON: Gentlemen those are the letters addressed to Mr. Potbury. I would be glad to use one of them if you don't object to it. I offer in evidence the letter of Grant Parish of February 2, 1905, addressed to Judge C. C. Cole.

(The letter so offered in evidence is marked "Plaintiffs' Exhibit M. & B. No. 16 and is as follows:)

February Second, 1905.

"Judge C. C. Cole, Washington, D. C.

DEAR SIR: My sister and I would like to have you arrange an hour whereby both of us can meet you and have a thorough understanding on several matters which we think of vital importance. I wish you to meet my sister.

In the following lines I represent myself and voice only my own individual opinion, not my sister, understand this as she will at all times have full ability and liberty to act for herself independent of me.

I understand that Messrs. McGowan, Brookshire, and Morey have requested an interview with you and your associates who will represent us in the Probate Court. I fully know the nature of this conference before it will take place. My father dismissed these lawyers from gross incompetency, having failed through their incompetency in forcing the Government of the United States to pay what the Auditor of the Treasury Department had found lawfully due him.

"My father had no intention whatsoever to allow them to re-enter the case again, it is my purpose to follow in his footsteps absolutely and without question.

"A. As to compensation for their labors it was his intention to have them go to court and establish their claims and for the court to be the referee. It was not at any time the intention of my father to evade paying any honest, moral, legitimate debt, this especial one or any other. On this point I propose to do just what my father had intended to do with Messrs. McGowan, Morey, and Brookshire.

"This conference means that they, Messrs. McGowan, Morey and Brookshire, will suggest and urge a joint-combination. That they will hold over your head this power of attorney as a club and for the good of all concerned seek to become a part of your legal campaign and authority.

"If my father was alive he would reject any overture or concession coming from McGowan, Morey and Brookshire. It is my intention to question the legal status of this power of attorney.

"Several times previous to my father's death he had mentioned the names of J. J. Darlington and Judge C. C. Cole as attorneys he might employ when he started to fight the Government again; previously to his death I had urged him in this matter both as to Darlington and yourself, so you see that this is no new matter since my father's death as far as you are concerned.

"Messrs. McGowan, Morey and Brookshire chased after my father and finally threatened him but my father had had forty
101 years of litigation and ripe experience; he had been the victim of their gross incompetency and wanted no more of it. That was the situation before my father's death and it is the situation now. I will oppose any treaty or mutual overtures. They are out of the case and must stay out, the court to pass on the value of their services and get their compensation by order of the court. I will fight on these lines if I knew I would get licked in the end; they are a barefooted lot and bluff I never fool with.

"I shall oppose the appointment of my brother to any capacity whatsoever in the management of the estate or the legal conduct of the prosecution. I was not aware of the last two wills, when my father died I had the impression that the first will was the only one in existence. On October 24th my father made a new will, my father knew his business, and it was his last business wish and desire and on this will I will fight to have probated and made lawful with full power to act.

"On all other points or questions you will find me, my dear Judge, a very obedient and docile client.

Yours truly,

(Typewritten signature) GRANT PARISH."

Mr. CONRAD: We have no objection. You may put them all in. This letter has no date to it; no year. You can ask him what year it was.

Mr. DARLINGTON: I also offer in evidence a letter produced by the witness dated simply "Thursday Eve," signed "Grant Parish." Can you tell us, Mr. Potbury, the time or year this letter I am speaking of, was sent you?

The WITNESS: There are so many dates in this case, it is almost impossible to remember them. This letter was received shortly after the death of Joseph W. Parish.

Mr. DARLINGTON: We offer it in evidence.

Mr. ROBINSON: Will you read the letter?

Mr. DARLINGTON (reading):

"WASHINGTON, D. C., Thursday Eve."

"DEAR JESSE: When absolutely not engaged on more important business and at leisure, train your thought on the general view of the case based on the contract being void——"

I guess you can read it better than I can (handing paper to Potbury).

The WITNESS (reading):

"And knowing that as a certainty and drawing it up with that knowledge well in hand and law must give relief in some direction to proceed against.

"McGowan, for argument sake, we grant, etc., contract void, a copy of it would in no way assist you in this new feature of the case.

"I feel confident that we have McGowan foul.

Yours very truly,

GRANT PARISH."

102 That letter evidently was received in answer to a personal request or communication from me to Grant Parish, to furnish me with a copy of the contract that they held.

Q. Which who held?

A. Mr. McGowan, Mr. Brookshire and Mr. Morey.

(The letter so offered in evidence was marked "Plaintiffs' Exhibit M. & B. No. 17, and is as above recorded.)

Cross-examination.

By Mr. CONRAD:

Q. Mr. Potbury, you were counsel for Miss Parish as Executrix of her father's will. You conducted all the proceedings for her, did you not?

A. With the assistance of Messrs. Cole & Donaldson, up to a certain stage.

Q. What part did Cole & Donaldson take in the probate proceedings?

A. Mr. Donaldson assisted me in preparing the petition. There were three wills offered for probate. I think there was a will dated June 10, 1902. I don't know who was the executor named in that will or whether an executor was named. Then there was a will dated February 14, 1903, in which—if I remember correctly—the son James H. Parish and Jonas H. McGowan, I think, were named as executors. I have to explain this matter in order to answer your question. Shortly after Mr. Parish's death, Miss Parish—I having known the family for quite a while—and Grant Parish called upon me—in fact, I assisted them to some extent in the funeral—

Mr. DARLINGTON: I want to object to this line of examination as not being at all responsive to his examination in chief, the witness only being offered to produce certain papers and to identify them.

A. (Continuing:) They called upon me in connection with the McGowan will being filed, we not having any knowledge of a subsequent will—

By Mr. CONRAD:

Q. By that, you mean the will in which Mr. McGowan was named as executor?

A. Yes.

Q. You had better put it that way.

A. (Continuing:)—of any subsequent will, I consulted (at the request of Grant Parish and I think Emily Parish) Judge Cole of the firm of Cole & Donaldson. We then found that there was a subsequent will, in which the Union Trust Company was executor and Mr. McGowan and Mr. James Parish were named as co-executors. Mr. Donaldson assisted me in preparing the petition and entered his appearance in the case, and his name appears in the publications, and so forth, up to a certain stage.

Q. You rendered in that matter a very considerable service, did you not?

A. I did.

Q. You were very active in the matter?

A. I believe so.

Mr. DARLINGTON: It is agreed, gentlemen, that our exception applies to all this examination?

Mr. CONRAD: Oh, yes,

103 Mr. DARLINGTON: And will apply throughout the examination of this witness, in like manner, to anything not responsive to his direct examination.

By Mr. CONRAD:

Q. Mr. Potbury, you also took a very active part and rendered very valuable service after the petition had been filed by Mr. Robinson and myself for mandamus, did you not?

A. Well, I believe I assisted as far as I could; not actively, but probably giving information and such things as that. I believe I sent the papers to you, Major, of the Comptroller of the Treasury, and such things as that; and I believe, if I remember correctly, that I prepared the contract by which you were employed.

Mr. DARLINGTON: I would like to ask, gentlemen, if you have ascertained the date of that.

Mr. CONRAD: Only approximately. The original is gone. I have the letter here that was given to me.

Mr. ROBINSON: A letter from the Parishes saying that eighteen months after the Secretary's decision we solicit your assistance, or something of that sort, in this case. The contract, of course, was drawn subsequent to that time.

By Mr. CONRAD:

Q. You were in very constant conference with me in my office about that matter, were you not?

A. Well, Major, I can't answer "constant conference." Up to the time you were preparing your petition for mandamus, I must have seen you two or three times. During the time of the pendency of the suit, I didn't see you; that is, during the pendency of the suit through the Supreme Court of the District, the Court of Appeals and the Supreme Court of the United States. After the decision I did.

Q. You were also with us when the draft was received from the Treasury?

A. I was. I assisted you at the time.

Q. And you took a deep interest in the matter; did you not?

A. I did.

Q. You stated that you placed those papers in the hands of Cole & Donaldson—the papers which you have produced?

A. I did.

Q. Do you remember by what authority or at whose request you did so?

A. As far as I can recollect of what occurred there, leading up to the answer of your question, I might state this: Mr. Grant Parish had been in my office a number of times before the death of his father and had consulted me about the ice claim. And upon the death of his father, he, and I think Miss Emily, consulted me relative to seeing Mr. Darlington. If I remember correctly, I did see Mr. Darlington and Mr. Darlington was too busy at the time and suggested Judge Cole. I think then I had a conference with Mr. Grant Parish and it was arranged that the matter should be placed

in the hands of Judge Cole, and a conference was arranged with Judge Cole, and, if I remember correctly, a conference was had with Mr. Donaldson at which Judge Cole came in and said
104 he was too busy to take it up at that time but would make a later engagement. With that I placed all the papers in the hands of Cole & Donaldson, with the understanding that Judge Cole would go over them.

Q. How long was that before Judge Cole's death?

A. That I cannot answer exactly.

Q. Approximately?

A. Probably a month, or something like that—six weeks. I knew Judge Cole's death interfered with the conference.

Q. And up to that time your relations with the Parish family had been very friendly?

A. They had; very.

Q. And that friendly character of relationship continued up to when?

A. Well, it continued, so far as I am concerned, to the present time.

Q. You have seen a great deal of Grant Parish, have you?

A. I have tried a number of cases for him, and given him my advice.

Q. And you found it easy, or otherwise, to get along with him?

A. Well, that I will ask counsel to judge. I have found him easy sometimes and, other times, otherwise.

Q. Have you not separated yourself now from all of his business in which you represented him as counsel?

A. I have. In this case I notified all counsel to that effect; although I do not remember whether my appearance has been withdrawn of record.

Q. And in other cases.

A. And in other cases.

Q. When did that separation take place?

A. Shortly after the decision in the Supreme Court of the United States.

Q. How long after?

A. When the case was settled in the Probate Court.

Q. In the Probate Court?

A. In the Probate Court.

Q. You have had some further disagreement with him about another case in which you were counsel, have you not?

A. Without going into particulars, I can answer that, Major, by saying I don't think it has anything to do with this case.

Q. Just to show this: That relations which were otherwise mutual and smooth, have now been interrupted.

A. As far as I am concerned; no. Since you have asked the question, however, I had a case which I had conducted up to the point of arguing in the Circuit Court of Albemarle County. Judge R. T. W. Duke, Jr., was with me in the case and owing to the disposition of Mr. Parish towards Mr. Duke and myself, we resigned, without any compensation.

Q. Is it not the fact that you no longer have the relations with Mr. Parish that you formerly did; is that not true?

A. As far as he is concerned, yes. As far as I am concerned; no. He brought the severance on himself and, as a man, I of course would recognize his actions.

Q. He is a very difficult proposition to deal with is he not? Haven't you found it so?

A. Yes; and I think you will agree with my opinion in that respect.

Q. During our many interviews, Mr. Potbury, about this action in which I was of counsel, you did not find it necessary to mention to me anything about Cole & Donaldson being connected
105 with it; did you?

A. No; I did not, because at that time they had resigned from the case.

Q. I am going to ask you another question. You prepared the contract of my employment in this case?

A. I believe I did.

Q. Yes; you did. At that time, to your knowledge was there any other member of this bar who was counsel then representing that claim which you knew of?

A. I shall have to answer that question in this way. At the time the matter was placed in the hands of Cole & Donaldson, before the receipt of the communication from Mr. McGowan, Mr. Morey and Mr. Brookshire which has been filed in this case, I personally knew that Mr. McGowan and Mr. Brookshire were in the case. I knew this from my conferences with Joseph W. Parish, and I knew so from my conferences with Miss Emily Parish and Mr. Grant Parish. If I remember correctly, I advised Messrs. Cole & Donaldson to that effect. They certainly knew of it after the receipt of the communication, and I must have advised them, because they knew of the will in which Jonas H. McGowan was named as one of the executors. This outstanding will was one of the principal reasons for retaining other counsel.

Q. Now I am going to hazard another question.

A. (Interrupting.) I have not answered the question fully. I also knew this, that Mr. Grant Parish was exceedingly antagonistic to Mr. McGowan and Mr. Brookshire, and especially to Mr. Morey. That was the reason, probably, why he wrote that letter which is dated "Thursday Eve." His object was to defeat, if possible, the outstanding contract. I stated to him that I didn't see how we could get over that contract and upon Judge Cole's death the matter was taken entirely out of my office and, I believe, placed in your hands; Mr. Parish stating at that time that he was then going to take the matter in his own hands—

Q. Which Mr. Parish?

A. Mr. Grant Parish; and I believe he made some statement that he would consult Mr. MacVeagh. I finally learned he had placed the matter in your hands.

Q. Mr. Potbury, in our conferences—yours and mine—you were very free in commenting on every feature of the case; is that not true?

A. The same as I have been here on the witness stand.

Q. Did you ever tell me at the time of that contract that Mr. McGowan, Mr. Brookshire and Mr. Morey were counsel in this case?

A. I did not Major, because Mr. Parish employed you himself. I was not of counsel—I think I had ceased to be counsel in the ice claim.

Q. After what date?

A. After the time it was placed in your hands. Mr. Parish placed it in your hands himself and, if I remember correctly, I am positive there was a little eruption between Mr. Parish and myself which finally blew over, and I came back and took full charge of the probate proceedings.

Q. Mr. Potbury, in all your conferences with me about this matter, in the early stages of it, did anything ever occur to convey to your mind the impression that I knew that Mr. McGowan, Mr. Brookshire and Mr. Morey were counsel in this case?

A. I must answer that question frankly, Major.

106 Q. Of course you must.

A. You did not so state to me; neither did I advise you of it. But I did not do that because you had the case from another source, other than from me. Had I been associated with you, I undoubtedly would; but at that time my work ceased in the ice claim and I then took up the probate matter.

Q. By probate, you mean the proceedings in the Probate Court—proof of claims, and things of that sort?

A. The proof of claims, and the winding up of the matter in the probate court if they obtained their money; which they finally did.

Q. Mr. Potbury, did you ever have any conversation with Mr. Brookshire about his part in this matter?

Mr. DARLINGTON: One moment. Can it be agreed that the counsel make the witness their own?

Mr. CONRAD: He is not, sir.

Mr. DARLINGTON: Then I object on the ground that it is perfectly obvious, and I am sure it must be to the distinguished counsel themselves, that this line of inquiry is not germane to the examination in chief, and would not for a moment be permitted if the testimony were taken in the presence of the court. I shall move to exclude any answer the witness may give, or have the testimony treated as the testimony of the defendants. I want to make the further objection that there has been no foundation laid for this question.

(The pending question was read by the stenographer as follows:)

“Q. Mr. Potbury, did you ever have any conversation with Mr. Brookshire about his part in this matter?”

By Mr. CONRAD:

Q. You can answer yes or no, first.

A. Yes.

Q. In this conversation that you had with Mr. Brookshire, did he express any opinion to you as to whether the remedy that I had employed was the proper remedy or not?

A. I must answer your question fully.

Mr. DARLINGTON: Is it agreed that my objection shall apply to all this line of examination, without repetition?

Mr. CONRAD: Yes.

A. I never was in the office of Mr. Brookshire or Mr. Morey pending this matter, at all. Mr. Brookshire got on the 11th street car one morning, at the corner of 11th and M streets, by Miss Summers' Seminary, I think, and also met me one morning in front of the Loan and Trust Building as I changed cars for my office. The exact language he used at that time, I do not remember, nor can I give the exact words; but it was, as far as I recollect, that they were on the wrong track and the matter should be presented to the Court of Claims, or something like that.

Q. What matter was he referring to?

A. To the ice claim.

Q. To the petition that had been filed for the mandamus—the suit that had been brought by us?

A. I think probably it was. That is the only conversation I ever had with him.

107 Q. Was that after he had brought the suit?

A. Yes; and probably that conversation did not last but just a couple of minutes.

Redirect examination.

By Mr. DARLINGTON:

Q. Was your information sufficient to enable you to state that they should report the matter to the Court of Claims first?

A. As I recollect the conversation, I considered myself out of the case, and, in fact, I think I refused to talk to Mr. Brookshire about it.

Q. By way of refreshing your recollection, if I can, do you recall stating that the matter should have been brought before the Court of Claims first and then, if it failed there, there was still left a remedy by mandamus?

Mr. ROBINSON: I object to that question as emphatically leading. (The question was read by the stenographer as above recorded.)

A. I do not remember the exact conversation. In the car the conversation was simply, as I remember, "what did I know" or "what information I had," or something like that. The conversation at 9th and F Streets was, as I remember, that Mr. Brookshire had a decision that it ought to have been brought before the Court of Claims, or something to that effect. Now, whether anything was said about mandamus, or not, I am not positive and can't so state.

Mr. ROBINSON: I understand that you stated that Mr. Brookshire said the proceeding which had been taken was on the wrong track?

The WITNESS: Something to that effect.

JESSE E. POTBURY.

Subscribed and sworn to before me this 5th day of April A. D. 1910.

E. L. WHITE,
Examiner in Chancery.

(Thereupon, at 11:40 o'clock, a. m., an adjournment was taken until further notice.)

E. L. WHITE,
Examiner in Chancery.

To E. L. White, Examiner:

Please note on the record of the proceedings before you in the taking of testimony in the above-entitled cause that the taking of testimony in chief on behalf of the complainants is, this 30th day of March, 1910, concluded, the complainants reserving the right to give in evidence on behalf of complainants a copy of the Power of Attorney given by Joseph W. Parish to J. H. McGowan after the passage of the Act of Congress of February 17th, 1903; a copy of the argument filed by Messrs. McGowan, Brookshire and Morey with the Auditor of the War Department on or about the 20th of March, 1903; a copy of settlement certificate 23,729, transmitted to the Secretary of the Treasury, under the provisions of the Act above referred to; and a copy of the will of Jonas H. McGowan.

NATHL. WILSON,
J. J. DARLINGTON,
Solicitors for Complainants.

March 30th, 1910.

Received, and made part of the record in the above entitled cause,
March 30, 1910.

E. L. WHITE,
Examiner in Chancery.

Defendant's Testimony.

Filed November 30, 1910.

* * * * *

Be it remembered that at an examination of witnesses begun and held on the 26th day of April, 1910, and at other times agreeably to adjournments hereinafter noted, personally appeared before me, Enoch L. White, an examiner in chancery of said Court, the within named—Ellwood P. Morey, Emily E. Parish, and Thomas T. McKee, who, being produced as witnesses of lawful age for and on behalf of the defendants herein, and being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the said above entitled cause, did depose and say as follows:

WASHINGTON, D. C., Tuesday, April 26, 1910—

11 o'clock a. m.

Met pursuant to agreement, at the office of Holmes Conrad, esq., in the Home Life Building.

Present on behalf of the plaintiffs, Mr. Nathaniel Wilson.

Present, on behalf of the defendants, Mr. Holmes Conrad and Mr. Leigh Robinson.

Present, also, the Examiner.

Whereupon ELLWOOD P. MOREY, heretofore sworn as a witness, was recalled for further examination.

By Mr. CONRAD:

Q. Mr. Morey, I hand you a letter dated "Sunday, October 9, 1904" addressed to "Dear Mr. Parish." Please examine it and state if that letter was written by you.

A. That letter was written by me.

Q. I hand you another letter, dated August 31, 1904, addressed to Mr. E. D. Whitney, Metropolitan Hotel. Please examine it and see if that letter was written by you.

A. Yes sir; that letter was written by me. I would like to make a little explanation of this one letter written to Mr. Whitney. As

I recall now, this letter was written to Mr. Whitney at the request of Mr. Parish. According to my recollection, he was endeavoring to negotiate a loan with or through Mr. Whitney, and he requested me to write a letter similar to that.

Mr. WILSON: That is the October 9th letter?

The WITNESS: No; August 31st.

A. (Continuing:) I have no comment to make in reference to this letter, as nothing occurs to my mind at the present time.

Mr. CONRAD: I offer these in evidence.

Mr. WILSON: I object to it as immaterial and irrelevant.

(The letters so offered and identified were marked "Defendants' Exhibits Nos. 2 and 3", are as follows:)

EXHIBIT No. 2.

SUNDAY, Oct. 9th, 1904.

DEAR MR. PARISH: "I called at your house today but failed to find you. I am extremely anxious to see you, as I have some very important news concerning your case, and, therefore, ask that you call at my office tomorrow morning without fail. However, if, for any reason, you do not care to call at my office, telephone me, and I will meet you at any place you suggest.

Yours truly,

E. P. MOREY."

EXHIBIT No. 3.

Law Offices E. P. Morey,
Washington Loan & Trust Building.

WASHINGTON, D. C., August 31, 1904.

Mr. E. D. Whitney, Metropolitan Hotel, Washington, D. C.

DEAR SIR: Having assisted in preparing and presenting Mr. J. W. Parish claim against the government, under the Act entitled "An Act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due, under which Act the Auditor for the Treasury Department found due the sum of \$181,358.95, which for reasons purely arbitrary and contrary to the express terms of the Act, have not been paid. There is every reason to believe if other plans fail in the next 90 days, that at the next session of Congress a direct appropriation will be made by Congress for the payment of the full amount due as found by the Auditor.

Respectfully,

E. P. MOREY."

Reading and *arguing* of the foregoing deposition by the witness waived by consent.

E. L. WHITE,
Examiner in Chancery.

Miss EMILY E. PARISH, called as a witness in her own behalf, after being first duly sworn, is examined.

110 By Mr. CONRAD:

Q. Miss Parish, you are the daughter of Mr. Joseph W. Parish?

A. Yes sir.

Q. He resided in this City?

A. Yes sir.

Q. Where was his residence?

A. 217 A Street, southeast.

Q. How long had he been residing there?

A. Well, as near as I remember, I think about twenty-one or two pages. I don't remember exactly.

Q. Who constituted the household, or the family of Mr. Parish, say, in the year 1900—who were the members of the family?

A. My father, J. W. Parish; my brother, Grant Parish, and myself.

Q. What is the difference in age between yourself and your brother Grant Parish?

A. I am five years and a half older than Grant.

Q. Have you always, during the last twenty years, resided, yourself, at that house as a member of your father's family?

A. I have.

Q. Has Mr. Grant Parish, during that period, always resided there as a member of that family?

A. Yes sir; that has always been his home, but he would be away for a few weeks at a time.

Q. Miss Parish, between the 31st of May, 1904, and the 26th of December, of that year, was your father absent from the City of Washington?

A. He was not.

Q. Was he continuously here during that entire period?

A. He was.

Q. And was he or not, to your knowledge, at any time out of the city for as long a period as twenty-four hours.

A. Well, I am positive he was not out of the City during that period.

Q. What were your father's habits during that period, as to staying about the house or being absent from the house during the day?

A. Well, as near as I can remember, my father went down in the city—I don't know that he went every day or not, but he did go down in the city. I knew he was in and out of the house during the day, and spent much of his time at home.

Q. Miss Parish, when did you first learn of a contract between your father and Mr. J. H. McGowan, dated the 3d day of December, 1902, as to Mr. McGowan's employment in the prosecution of the claim of your father against the United States Government for ice; when did you first learn of that contract?

A. Well, I first—my first hearing of it was when this bill was filed.

Q. I ask you the same thing as to the contract between your father and Mr. Brookshire, the 20th of January, 1903?

A. I first heard of that contract at that time—when this bill was filed.

Q. Please state if you had ever heard of any contract between your father and either of these two gentlemen as to their employment in the prosecution of this claim, prior to the filing of this bill.

A. No sir; I never heard of any contract.

Q. You are the executrix of the will of your father, are you not?

A. Yes sir.

Q. And have regularly qualified as such?

A. I have.

Q. Did you know Mr. Jonas H. McGowan?

A. I did.

111 Q. Did you know Mr. Brookshire?

A. I did.

Q. Did you know Mr. Morey?

A. I did.

Q. Did you know, during your father's lifetime, that these gentlemen were engaged in the prosecution of his claim against the Government on this ice matter?

A. Yes sir. I knew they were his attorneys.

Q. Miss Parish, after your qualifications as executrix of the will of your father, did you at any time receive any communication from either of these gentlemen—either Mr. McGowan or Mr. Brookshire?

A. I never did.

Q. Did either of these gentlemen, to your knowledge, ever call to see you—either Mr. Brookshire or Mr. McGowan?

A. No sir.

Q. Did you ever receive from them, in any form, any information or statement as to their employment by your father for the prosecution of this claim?

A. I never did.

Q. Did either of these gentlemen, after your qualification as executrix, either directly or indirectly, and in any manner or in any form, offer to continue the prosecution of this claim against the United States?

A. They did not.

Q. You must pardon me for asking you this question, but it becomes necessary: Have you, at any time since your father's death, been insolvent and unable to pay your debts?

A. No, sir; I have not.

Q. Who is the owner of the house in which you reside, that you have referred to?

A. I am.

Q. Have you ever intended at any time, if you should receive the amount that was due from the United States to your father on account of this claim, to take it outside of the jurisdiction of the courts of this District?

A. No sir.

Q. Did you ever employ the firm of Cole & Donaldson, lawyers, or either of those gentlemen, to represent you in the probate matters of your father's estate?

A. No sir. I never did.

Q. Did you ever authorize any one to employ that firm or either of the members of it to represent you in the probate matters of your father's estate?

A. No sir. I never did.

Q. Have you ever heard, during the life of your brother Grant Parish, of his ever having received any injury or sun stroke, that affected his mind?

A. I never heard anything of the kind.

Mr. WILSON: That is objected to as irrelevant and immaterial.

By Mr. CONRAD:

Q. Have you ever known of your brother Grant Parish's mind being in any wise injuriously affected?

A. I never have.

Mr. WILSON: Objected to as irrelevant and immaterial. The objection applies to the question and the answer, and is accompanied with notice of a motion to strike out.

By Mr. CONRAD:

Q. I hand you a letter that has been already put in evidence as

Complainants' Exhibit No. 11, and another letter that is also
112 in evidence as Complainants' Exhibit No. 13. I ask you to
look at those two letters, examine them, and state in whose
handwriting they are—the first and the third letter in that bunch
(handing papers to witness).

A. This one is my father's handwriting, and that is his signature
(indicating.)

By Mr. WILSON:

Q. Which one is that?

A. No. 11.

By Mr. CONRAD:

Q. Now look at No. 13.

A. Yes sir; that is my father's handwriting.

Q. And his signature?

A. And his signature.

Q. Miss Parish, in the course of the administration of your
father's estate, as executrix under his will, has your brother, Grant
Parish, ever been authorized by you to act as your agent in any
manner?

A. No sir. He never has.

Q. Has he ever been empowered or authorized by you to represent
you in any matter connected with your administration of your
father's estate?

A. No sir.

Q. To what extent have you, in that matter, used the services
of your brother in communicating with other people?

A. Well, I have asked my brother to take messages, and he has
done so.

Q. Miss Parish, from your knowledge of your father's character
and temperament, will you please state whether it accorded to those
characteristics of his that he could have been intimidated or induced
by threats or persuasion of his son, Grant Parish, to write or sign
letters of which he did not approve?

Mr. WILSON: Objected to as leading, incompetent, immaterial,
and as calling for the opinion of the witness in regard to matters that
are immaterial.

A. No; that would have been impossible. My father was not the
kind of a man that would allow any one to influence him.

Mr. WILSON: Objected to for the same reason, and I move that
the question and answer be stricken out.

Mr. CONRAD: That is all.

EMILY E. PARISH,
By the Examiner, by Consent.

Subscribed and sworn to before me this — day of April, A. D.
1910.

Mr. WILSON: As I have already stated to you, Mr. Conrad, I will reserve the cross examination of this witness until Mr. Darlington can attend. We will not delay the matter any longer than necessary and may possibly be able to go on with the cross examination tomorrow afternoon.

Mr. CONRAD: I had not intended to call any other witnesses, but if you have no objection, and as Mr. McKee is here, I would like to put him on the stand.

113 Whereupon—THOMAS H. MCKEE, a witness of lawful age, called by and on behalf of the defendants, after being first duly sworn, is examined.

By Mr. CONRAD:

Q. Where do you reside, Mr. McKee?

A. 1420 21st Street, this city.

Q. How long have you been living there?

A. Thirty years.

Q. What was your employment when you first came to this city?

A. Well, I was employed in the House and Senate for twenty-two years—up to seven years ago.

Q. How were you employed there?

A. I was Journal Clerk of the House, the last office I filled there, for eight years.

Q. What is your present position?

A. Warden of the jail.

Q. I believe you are an attorney at law by profession?

A. I was eligible to practice law when I came here, but I have never practiced here.

Q. Did you know the late Joseph W. Parish?

A. Yes, sir.

Q. What was the extent and character of your relations with him?

A. Mr. Parish was about Congress a great many years, during the time I served as a subordinate officer there. I knew him as a claimant who was about the various offices for perhaps fifteen or twenty years.

Q. Will you state whether, after the severance of your connection with the Congress of the United States, you were employed by Mr. Parish in connection with the claim he held against the Government of the United States for ice?

A. I think in the winter of 1903-04, or 1904-05—I am not quite clear as to the year now—Mr. Parish came to see me. I was just in private business then, having resigned from the journal clerkship, and had an office on G Street. Mr. Parish was incidentally associated with me in the same office. He approached me one day with a bundle of papers in his hand and said that he would like to have me take charge of his claim against the Government; that it seemed to be tied up, and there was nothing doing. We had several conversations about it. He left the papers with me and went away. I think five or six days after that he died very suddenly.

Q. After he left the papers with you?

A. After he left the papers with me he died very suddenly. I attended his funeral and I then had some conversation with his daughter, who was present, with reference to going on with the matter. I never made any contract with Mr. Parish, but told him I would look into the matter. But afterwards, when Miss Parish requested me to look thoroughly into the matter with a view of taking it up, I did make some inquiries then as to the status of the case.

Q. Did you ever meet Mr. Jonas H. McGowan in reference to the matter?

A. I called at Mr. McGowan's office once and conferred with him.

Mr. WILSON: I object to any answer to that question. I object to the question as immaterial and incompetent and I object to the answer as apparently not responsive to the question.

114 A. (Continuing:) I asked Mr. McGowan what the status of the case was and who the attorneys were of record. As near as I remembered—it is five years ago—his answer was this: That he had prepared it and followed it up, to the time it was rejected in the Treasury Department, but he said, "I don't care who collects it, I want my fee out of it." That was about the substance of his answer.

Mr. CONRAD: That is all.

Mr. WILSON: I will also have to reserve the cross examination of this witness, for the reason I have already stated.

Reading and signing of the foregoing deposition by the witness waived.

E. L. WHITE, *Examiner*.

Mr. CONRAD: Mr. Wilson, this is just to exclude a possible conclusion. I have gone to the Court of Claims and gotten the volume of the printed records containing the original Parish Case, and the only counsel that appears here at all in this case for Mr. Parish was a Mr. Sanborn. I thought you might be willing to stipulate on the record that he is the only counsel appearing of record in the case.

Mr. WILSON: I am willing to stipulate that it may be considered in the record and any part of it referred to by either party desiring to use it.

Mr. CONRAD: I just wanted to see if you could not stipulate, after looking at it, that no other counsel appears here but John H. Sanborn.

Mr. WILSON: What is the number of the case?

Mr. CONRAD: It is the claim of Parish vs. United States, No. 6492.

Mr. WILSON: What year was that filed?

Mr. CONRAD: The decision was filed, but there is no date to Drake's opinion.

Mr. WILSON: What is the volume?

Mr. CONRAD: It is in the Court of Claims, December Term, 1880, K. to P.

Mr. WILSON: What is the volume number?

Mr. CONRAD: Eighty-seven.

Mr. WILSON: I have no objection to agreeing that any part of that record can be used by either of the parties desiring it.

Mr. ROBINSON: We want to put in evidence the original order for the appearance of Holmes Conrad and Jesse E. Potbury, attorneys for the defendant Emily E. Parish, executrix. Mr. Conrad's autograph is unquestionably his own, but I want to know if you will admit the signature of Mr. Potbury.

Mr. WILSON: This is an order for their appearance, filed May 24, 1909?

Mr. ROBINSON: Yes.

Mr. WILSON: I think there is no great question as to the signature of Mr. Potbury.

(The paper so offered in evidence was filed and marked "Defendants' Exhibit No. 4," and is as follows:)

115 Filed May 24, 1909, J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, the 24th Day of May, 1909.

Equity. No. 28561.

JONAS H. MCGOWAN et al.

vs.

EMILY E. PARISH, Executrix, etc., et al.

The Clerk of said Court will enter the appearance of Holmes Conrad and Jesse E. Potbury as solicitors for the defendant Emily E. Parish, executrix.

HOLMES CONRAD,
JESSE E. POTBURY,

Attorneys for Defendant, Emily E. Parish, Executrix."

(Thereupon, the further taking of testimony in this cause was adjourned until further notice.)

E. L. WHITE,
Examiner in Chancery.

WASHINGTON, D. C., April 27, 1910—

3:30 o'clock p. m.

Met, pursuant to agreement, at the office of Holmes Conrad, Esq., in the Home Life Building.

Present, on behalf of the plaintiff McGowan, Mr. Nathaniel Wilson.

Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Whereupon Miss EMILY PARISH, a witness heretofore sworn, was called for cross examination.

By Mr. WILSON:

Q. Miss Parish, you have testified that during your father's lifetime you knew that Mr. McGowan and Mr. Brookshire were his attorneys?

A. Yes sir.

Q. When and where did you first meet Mr. McGowan?

A. Well, that would be very hard to say now; it has been a great many years. I really can't say where I first met Mr. McGowan.

Q. You knew Mr. McGowan as your father's attorney?

A. Yes sir.

Q. When did you first know him as being your father's attorney, and in respect to what business?

A. Well, the first of my knowing it was when they had the case before the Departments.

Q. To what case do you refer?

A. The ice case.

116 Q. And before what department was it then pending?

A. Well—the Treasury Department I think at that time.

Q. In what year was that, approximately?

A. Well, I don't know. It must have been the year 1903, as near as I remember it—two or three.

Q. Was that the time of your first acquaintance with Mr. McGowan as your father's attorney?

A. Well, I had heard father speak of Mr. McGowan, but I didn't know that there was anything active up to that time—that he was actively engaged.

Q. You positively didn't know, before that time, that he was acting as your father's attorney in respect to this ice claim?

A. No sir. I have never known it. I don't remember that he did.

Q. Where were you residing at that time?

A. 217 A Street, southeast.

Q. And your father was residing with you?

A. Yes sir.

Q. And your brother Grant was residing there?

A. Yes.

Q. At that time, to whom did that house belong?

A. What time do you refer to?

Q. 1903.

A. It belonged to me.

Q. It belonged to you?

A. Yes, sir.

Q. How did you obtain it?

A. How did I what?

Q. Obtain the house?

A. Well, I can't see what that has to do with this case. That is a good many years back, and I don't know how I happened to claim the house.

Q. You object to answering?

A. I don't think it is necessary to answer the question.

Q. How long before 1903 had you been living in that house?

A. Well, as I said yesterday, as near as I remember I have been there about twenty-two years. I don't really remember when I did get the house. I could of course look at the record.

Q. I only wish you to state as near as you can recollect.

A. That is as near—I don't remember the exact time.

Q. Was it purchased by you with your own money?

A. Yes.

Mr. CONRAD: I object to these questions as being irrelevant to any issue in this cause.

By Mr. WILSON:

Q. Do you mean to be understood as saying that before the time to which I have referred, in 1903, Mr. McGowan had not, within your knowledge, acted as attorney for your father?

A. Well, as I said before, I don't remember that.

Q. Didn't you know, Miss Parish, that that house was purchased with the proceeds of a judgment obtained in the Court of Claims in the case in which Mr. McGowan was attorney?

A. Well, as I said before, I don't know who were my father's attorneys at that time—you want that; that is what you referred to, is it. I did not know that Mr. McGowan was my father's attorney then.

Q. Is it not true that that house was purchased with the proceeds of the case—what is known as the first case in the ice claim, and with money obtained by a suit in the Court of Claims?

A. Yes sir.

117 Mr. CONRAD: Just a moment please, Miss Parish. Please don't answer until I have a chance to object.

Mr. ROBINSON: Just fix the date of that, as it may conflict with this last one.

Mr. WILSON: I don't want the date at present myself. She can fix the date if she chooses, but I am not concerned about the date.

By Mr. WILSON:

Q. In respect of that property, purchased from the money obtained in that suit, was there not a suit instituted against you by creditors of your father, to obtain the title to that property?

Mr. CONRAD: I object to that on the ground that that is a matter of record; and, further, that it is immaterial to any issue in this case.

Mr. WILSON: Now you can answer.

A. Yes; there was.

By Mr. WILSON:

Q. And did not Mr. McGowan appear and engage actively in that suit?

A. He did; and also Mr. Hazelton.

Mr. WILSON: My question is as to Mr. McGowan, and the answer, so far as it relates to any one else, is objected to; and I will ask the witness to make answer to the question without referring to other persons or events.

By Mr. WILSON:

Q. Did he appear for your father or for you, or for both?

A. He appeared for me, as near as I remember. I don't remember any one else; the suit was brought against me.

Q. And you became well acquainted with Mr. McGowan?

A. Yes sir; I became acquainted with Mr. McGowan.

Q. And you had been acquainted with him before that time?

A. No sir; I don't think I had.

Q. In what year was that?

A. I do not know.

Q. What year was the suit decided in your favor?

A. That I don't remember.

Q. As nearly as you can, with reference to the year 1903, state what year it was in which that suit was decided in your favor.

A. Really I don't—decided in my favor, did you say?

Q. Yes. The creditors were defeated; weren't they?

A. Well I don't—now, as near as I can remember, about 1902 or '03, as near as I can remember. I really do not know the exact date.

Mr. CONRAD: Do you know the exact date, Mr. Wilson. You might put it in, if you know it.

Mr. WILSON: I really do not know it.

Mr. ROBINSON: The date can be fixed.

Mr. WILSON: I want to have her best recollection, if she can remember.

118 By Mr. WILSON:

Q. You say you don't remember.

A. I think about 1903.

Q. 1903. I would like you to state, recalling that suit—the suit in the Court of Claims and the suit to recover this property—when it was and under what circumstances you first knew that Mr. McGowan was your father's attorney in respect to this ice claim.

A. Well, I have already stated that—when the case was before the Departments.

Q. I want the year. You said 1903?

A. As near as I remember; I don't know. I can't remember exactly.

Q. And you still insist that it was in 1903 that you—

A. No; I don't insist upon it—

Q. Or assert?

A. No, I don't assert. It was 1902 or '03, or 1904—really I won't say; I can't say.

Q. Now, the other part of the question. Under what circumstances did you know of his being your father's attorney and engaged in that case?

A. Well, I know it was before the departments and heard father say as it progressed from one to the other, until it reached Secretary Shaw and was decided against him.

Q. Do you remember the date of the act of Congress that was

passed, and under which the action was taken and the case went to the Secretary of the Treasury?

A. No, sir. I don't remember that I ever knew the date.

Q. State as nearly as you can.

A. I don't remember that I ever knew it.

Q. When was the case before the Secretary of the Treasury?

A. It was the year before my father died, or the year he died.

I think it was that winter, 1904.

Q. What year did your father die?

A. My father died in 1904; the 26th of December.

Q. December, 1904?

A. Yes.

Q. How long before that time had the Act been passed? Do you remember whether that was the same year?

Mr. CONRAD: She said she didn't know.

Mr. WILSON: I only want to get it as definitely as I can.

A. I don't understand what you mean.

Q. I mean when it was before the Secretary of the Treasury.

A. The order to pay the money that the Auditor had found due?

Q. What had the Auditor found due?

A. I think it was one hundred and eighty-one thousand and—
I don't know; some dollars and cents.

Q. When did he find it to be due?

A. That I do not know.

Q. Can't state; have no idea?

A. No, sir; I have not.

Q. Can you state how long it was before that that the Act of Congress had been passed?

A. I don't know.

Q. What knowledge have you of any services rendered by Mr. McGowan in respect of the Act of Congress?

A. Well, I really do not know anything about it. I never interested myself specially in it, and I really do not know.

Q. Can you state as to 1903, of whom your family consisted, and were then residing at the place you mentioned.
Of whom did the family consist?

119 A. In 1903?

Q. Yes.

A. My father, and my brother Grant Parish, and myself.

Q. Had you any other brothers and sisters?

A. I had one brother.

Q. What is his name?

A. James H. Parish.

Q. Where did he reside?

A. Well, now, I don't know whether he was living in Madison, Wisconsin, at that time, or not; I am not sure.

Q. What is your best recollection?

A. Well, I won't be positive, but I think he was living there at that time—in 1903. I am not positive about it, though.

Q. In 1903, what means of support did the family have?

A. I decline to discuss our private affairs. I don't think that has anything to do with this case.

Q. You decline to answer the question? Did you have any income?

A. I had my home.

Q. Did you have any income other than your home?

A. Yes; my brother paid me his board.

Q. What brother?

A. Grant Parish.

Q. Had your father any income?

A. I don't know. As I have already stated, I decline to discuss our affairs—our private affairs.

Q. Why?

A. I don't think it has anything to do with this.

Q. Did you know the feelings that your father entertained towards Mr. McGowan?

A. No sir.

Q. You never heard him express any feelings of friendship, or obligation, or faithfulness for what he had done?

A. I never heard my father express himself.

Q. Did you ever yourself express any feelings of obligation to Mr. McGowan for what he had done?

A. Well, I was grateful to Mr. McGowan for his help.

Q. For what kind of help?

A. I don't know whether I was very grateful. I thanked him for it.

Q. You thanked him for it?

A. I don't know that I was very grateful to him; I thanked him for what he did.

Q. What were you grateful for? State it a little more definitely.

A. Why, I was grateful for what he did—for his friendship and the interest he took at the time that he had charge of the business, the suit against the House.

Q. State when, and to what extent, you first received any financial assistance from Mr. McGowan—either you or your father?

A. Well, to the best of my knowledge, the first I ever knew of Mr. McGowan—

Mr. WILSON: Read the question, please.

(The question was read by the stenographer as follows:)

“Q. State when, and to what extent, you first received any financial assistance from Mr. McGowan—either you or your father?”

A. As near as I remember it, it was when we were at Ocean Grove.

Q. When was that?

A. I think that was in 1903.

120 Q. What time?

A. When? I can't remember the exact time we were there.

Q. Not the exact date.

A. In the summer.

Q. When, and under what circumstances so far as you know, did

your father ever receive pecuniary assistance from Mr. McGowan?

A. Well, I don't know anything about my father and Mr. McGowan's arrangements—financial arrangements, or when he first assisted him.

Q. Have you any means of refreshing your memory as to the time when you first got money—received money as a friendly assistance or for your aid—from Mr. McGowan?

A. As near as I remember, it is all as I have stated. I don't remember any before that.

Q. Before what date?

A. Before the summer of 1903.

Q. The summer of 1903. That is pretty indefinite.

A. I thought you said it didn't make any difference.

Q. No, I didn't say it did not make any difference. I want you to state as nearly as you can.

A. I don't remember the exact time we went to Ocean Grove; it was in June, I think.

Q. It was after you went to Ocean Grove; was it.

A. Yes sir; as near as I remember.

Q. What time was that?

A. In June, sometime. I don't remember exactly.

Q. And what was the amount?

A. I think it was \$25 a week.

Q. \$25 a week?

A. Yes sir.

Q. And how long did that continue?

A. That continued until we came back in the city, the last of October.

Q. How much in all did he pay you?

A. I don't know. I never counted it up.

Q. You never counted it up?

A. No sir.

Q. And never repaid it, I suppose?

A. No sir. I had no right to repay it; it was not my debt.

Q. It was not your debt?

A. No sir.

Q. For what purpose was it advanced?

A. Mr. McGowan made the arrangement with my father. The money was sent to Ocean Grove for our use; but it was an arrangement made with my father, and I was never responsible for it in any way.

Q. For what purpose was it used?

A. I said for our expenses.

Q. Including yourself?

A. Yes sir.

Q. For food and clothing?

A. Not for food and clothing; no. Mr. McGowan never bought any clothes for me.

Q. What was the money used for?

A. As I said, for our expenses—our board.

Q. What other source of income had you, except the money you got from your brother and Mr. McGowan?

A. I had no other.

Q. And what source of income had your father, except money he got from Mr. McGowan and other friends?

A. I don't know.

Q. None that you know of?

A. I don't know anything about it.

Q. None that you know of—absolutely none, that you know of?

A. Please repeat the question.

Q. I did repeat the question.

A. I mean the first question you asked me.

121 Q. The question is whether you know of any income, or source of income, that your father had except money that he got from Mr. McGowan and his other friends?

A. What money do you refer to from Mr. McGowan?

Q. Any money for the household expenses.

A. Mr. McGowan never gave money for my household expenses.

Q. I am speaking of what knowledge you have of money paid to your father.

A. I don't know of any money that was paid to my father, other than I have already stated.

Q. What income had you during the time you were at Ocean Grove—what income had you or your father—other than the money that you received from Mr. McGowan?

A. He had no other money that I know of.

Q. He had no other money that you know of?

A. That I know of.

Q. You were dependent entirely on what you got from him during that time; is that so?

A. Yes sir.

Q. Were you in correspondence with Mr. McGowan during that time?

A. Well, I don't remember.

Q. You don't remember?

A. I do not.

Q. Give me your best recollection whether you wrote any letters to him and whether you received any letters from him?

A. Yes sir: I received letters from Mr. McGowan sending his check. I don't remember whether I answered them or not.

Q. Where was Mr. Grant Parish at that time, when you were at Ocean Grove?

A. He spent several weeks there, and the rest of the time he was at home.

Q. Here in Washington?

A. Yes sir; here in Washington.

Q. During that summer, Mr. McGowan was in Washington and you received letters from him here?

A. No; not all of them. Some of them were from Canada; I think Ontario, if I am not mistaken.

Q. Have you any of the letters that you received from him?

A. I don't know that I have; no.

Q. Did you keep those letters addressed to you?

A. No, sir; not now; I did have them.

Q. What did you do with them?

Mr. CONRAD: I have them. Do you want them?

Mr. WILSON: Yes.

By Mr. WILSON:

Q. While you were at Ocean City, what was being done in respect of the claim—the ice claim?

A. I don't think anything was being done.

Q. What was its condition; where was it pending?

A. Well, I do not know.

Q. Haven't you any idea where it was pending or what had been done about it, have you?

A. No, sir; I don't know that I have; I don't think there was anything much being done, at least I heard so.

Q. You heard who say so?

A. I heard my father say so. And then I think in some of the letters he had, as far as I can remember.

Q. Well, Miss Parish, you are the executrix of the estate.
122 I would like to know—I am not inquiring in any attempt to involve you in any difficulty—I would like the best of your recollection now as to what occurred in the summer of 1903 in respect of that claim. It was the claim known as the ice claim. Now, I would like you to state where that claim was pending and what happened to it when you got this money from Mr. McGowan; what had happened to the claim, and where was it, if you know?

A. Well, as I have already stated, I really do not know.

Q. You don't know whether the Act of Congress had been passed or not?

A. Well, it must have been passed, or it would not have been in the departments.

Q. And it was in the departments then; you say you know that?

A. It was in the departments as far as I know.

Q. Did you know anything about it—actively?

A. I did not know anything about it.

Q. You had nothing to do with it?

A. No sir.

Q. The thing was all in the hands of your father?

A. It certainly was.

Q. And he had entire confidence in Mr. McGowan, didn't he, when you were drawing this money?

A. I never heard him say.

Q. You never heard him say anything about that?

A. No sir.

Q. You never heard him express any feeling whatever of satisfaction, or friendship or regard for Mr. McGowan?

A. No sir; I never heard my father say.

Q. Will you examine this letter that I show you—this is dated September 29, 1903, and state if you identify the signature and whose signature is attached to the letter (handing paper to witness)?

Mr. CONRAD (after a pause): You can just answer the question without reading the letter, Miss Parish.

A. You mean the date; is that what you want?

By Mr. WILSON:

Q. I want to know if you identify the signature, and whose it is.

A. It looks like my father's, but he didn't usually write such a small hand.

Q. Is it, or is it not, according to the best of your knowledge?

A. It looks like it.

Q. Can't you say whether it is or not?

A. I say it looks like it. My father don't usually write so small.

Q. Upon the whole, taking everything into consideration, do you or do you not think that is your father's signature?

A. I can only repeat what I said, that it looks like it. I would like to read this letter if you please.

Q. Of course.

(After a pause.)

A. Well, all I have to say is I don't know anything about what was going on, that is in this letter.

Q. That answer is quite superfluous, and I shall ask to
123 have it stricken out. My question was, whether you recognize that signature?

A. I can only repeat that it looks like my father's.

Q. You think it is your father's; don't you?

A. I think it looks like it.

Mr. WILSON: I offer that in evidence, and ask that it be copied into the record.

Mr. ROBINSON: It is not a reply to any of the letters that you have?

Mr. WILSON: No.

(The letter so offered was filed and marked "Complainant's Exhibit M. & B. No. 18", and is as follows:)

(Personal.)

OCEAN GROVE, N. J., Sept. 29, 1903.

Friend McGowan.

DEAR SIR: Emily says she wrote you today on home returning, etc. If I am a 'judge' and think I am she wants to be near to Grant, to keep him 'O. K.' (which she can't do). I think Grant has impressed her that he can make trouble. The reason that he is Administrator of 'Joseph' or thinks he is impresses Emily somewhat. I told her I proposed not to trust him at all. That I proposed you & the Union Storage Co. Now so soon as we can show her that Grant is no longer administrator etc. that will get her into our camp in better form. If you think it policy why not you & her (act as) administrators. Jim don't care I am sure. You could impress Emily of the betterment of the change.

"I think until Grant is soundly 'sidetracted' he will be liable to act as a lunatic 'as he surely is.' It is an uncomfortable position to be in but the 'Devil don't care' when he can bring discord on all corners. If you can get the draft and get here without trouble I will stay here. If Em must go to Washington I can hold the fort here. Rand wants me to go to his place would if the P. O. business was properly settled. I am in good health and have all the courage needful.

hastily

(over)

J. W. PARISH.

When Jim was here Grant acted disgraceful but for me he would knocked him down. I impressed Jim that he was out of his mind and at last cooled down. You see this is no small matter to handle and think we can handle it properly if we give the matter attention.

J. W. P.

Excuse haste & errors.

P. S.—When you answer this write me what you think of the proposition just as if you thought this out yourself for our consideration and for the benefit of all hands. She might see the policy as I do. She of course wants to see your letters. Not to show them she would think something was going wrong."

124 By Mr. WILSON:

Q. I hand you now a paper dated the 29th day of September, 1903, purporting to be signed by Emily E. Parish, and ask you to state if you recognize that signature (handing witness paper)?

(After a pause.)

Mr. CONRAD: Is that your signature, Miss Parish?

The WITNESS: I can't tell you yet.

A. (After a pause.) Yes, sir.

Q. That is yours?

A. That is my signature.

Q. It is addressed to Mr. McGowan, and it is all in your handwriting, isn't it?

A. Yes, sir.

Mr. WILSON: I offer this in evidence.

(The letter so offered was filed and marked "Complainants' Exhibit No. 19," and is as follows:)

The Ardmore,
No. 8 Ocean Pathway, Fourth House from Beach.

OCEAN GROVE, N. J., Sept. 29th, 1903.

DEAR MR. MCGOWAN: I was very much disappointed we did not hear from you this morning. The time has arrived when it is necessary for me to return home, and some arrangement must be made so I can. The delay in the case is likely to continue as it has all

summer. The weather is cold, and we are both without proper clothing for this season of the year, as we did not expect it would be so long before a settlement would be made, and only made provision for Summer weather. He is growing very restless, as everything is closed, and no place to go, and very few people left. Mr. Rand's visit was of no especial benefit to him, as he has filled him full of his smoke scheme, and they have arranged to meet in Phila. the last of the week. I do not think it wise for him to go, as the thing we wish to avoid may happen, and he does not like me to interfere with his plans. I do wish it could be possible for us to return home the last of the week. We can stay here until the last of the week, Saturday morning the house will be closed, and it is not easy to find another place so late in the Season. It does seem as if we might be nearer home. Harpers Ferry, or some other place where I could look after both. I do not wish to make any mistakes or annoy you, but I think if you understood everything you would not think my wanting to be home unreasonable. I hope to hear from you soon on the subject. I think if my father stays here much longer, he will buy all of O. G.

Sincerely Yours

EMILY E. PARISH."

By Mr. WILSON:

Q. In this letter, you say that "the weather is cold and we are both without proper clothing for this season of the year." To whom did you refer there?

A. To my father and myself.

125 Q. And yourself?

A. Yes, sir. It was not because we didn't have clothes at home, but we only had summer clothing there. That letter, later on, will explain why.

Q. Under what obligation did you understand, or under what agreement, was then existing in respect of Mr. McGowan which justified you in writing a letter stating, as you did, that you were "very much disappointed we did not hear from you this morning?"

A. We had been wanting to come home, and I was disappointed, for father expected to hear from Mr. McGowan to tell us to come home. I don't know of any other reason.

Q. What right had you, or what reason had you, to complain to Mr. McGowan?

A. Because it was through him that we were sent down to Ocean Grove.

Q. Why did Mr. McGowan send you down and under what circumstances did he send you down to Ocean Grove?

A. Well, that I don't know.

Mr. ROBINSON: Let me ask you, Mr. Wilson: In all this examination—and may I make it for the future—I claim that you are making the witness you- own witness. This is not responsive to anything asked in direct examination.

Mr. WILSON: You can make your reservation or objection.

Mr. ROBINSON: I object to it, unless the witness is considered the witness of Mr. Wilson.

By Mr. WILSON:

Q. At the time this letter was written, had you any knowledge of any contract existing between your father and Mr. McGowan?

A. No sir; I had not.

Q. You knew nothing?

A. No sir.

Q. And under what circumstances was he making these contributions to you and your father. Do you know?

A. Well, that was my father's and Mr. McGowan's affair. I don't know.

Q. You didn't know anything about it?

A. No sir; knew nothing about their business arrangement.

Q. How were those moneys paid. Were these checks sent?

A. Yes.

Q. Were they sent to you?

A. Sent to me; yes.

Q. And you drew the money on them?

A. Yes sir.

Q. How did you apply the money?

A. For my board.

Q. For your board, and as you thought proper?

A. For my board, yes; and as I thought was needed.

Q. And that continued during the time you were at Ocean Grove—and you returned when?

A. I do not remember the exact date. It was the very last of October.

Q. October, 1903?

A. Yes sir.

Q. Then when you returned, what occurred. Where did you go?

A. I went to my home.

Q. To your house that you have spoken of here?

A. Yes sir.

Q. When did you see Mr. McGowan after you returned home on that occasion?

A. I don't think I ever met Mr. McGowan again. If I did, I don't remember it.

126 Q. After October, 1903, you never saw him?

A. Not that I remember. I can't remember that I ever did.

Q. And what knowledge had you personally of what was done in the case after that—after you returned—and from whom did you get the knowledge?

A. I didn't know very much about it, only in a general way that there was nothing being done.

Q. What do you mean by "nothing being done?"

A. Everything was at a standstill, as far as I understand.

Q. Do you know when it was that the Secretary of the Treasury decided against the claim—what month and the year?

A. I don't remember—it was in 1904.

Q. Nearly a year after this.

A. It was, I think—well, I am not sure. In May, it seems to me; I won't be positive, but it was in the——

Mr. CONRAD: That is right.

The WITNESS: Is that right; I don't remember. It was in 1904.

By Mr. WILSON:

Q. To the best of your recollection, from the time you returned home in October, to May 31, 1904—whatever it was—there was nothing being done?

A. I knew nothing about it.

Q. You knew nothing about it?

A. Yes.

Q. You have already said that you knew of nothing being done, so far as you were concerned?

A. I knew of nothing being done.

Q. You knew of nothing being done?

A. I knew nothing about it.

Q. Did you hear your father complain at that time of nothing being done?

A. I don't remember that I did.

Q. After May, 1904, when you say you think the claim was rejected, what knowledge have you of what was done; what personal knowledge have you of what was done?

A. You mean after Secretary Shaw decided against the case?

Q. Yes.

A. I don't know whether anything was done.

Q. What knowledge?

A. I have no knowledge of anything.

Q. You had no communication?

A. With who?

Q. Mr. McGowan.

A. No sir.

Q. During that time?

A. No sir.

Q. From the date of the Secretary's decision?

A. No sir.

Q. Until when? Until your father died?

A. I never had any communication with Mr. McGowan at that time—after I returned from Ocean Grove.

Q. You never communicated with him and never saw him?

A. Not to my knowledge, I never saw him; and I know I never communicated with him.

Q. You saw him before you went to Ocean Grove?

A. Yes sir; I saw Mr. McGowan.

Q. Where?

A. At his office.

Q. And when?

127 A. I saw him after my father had gone to Ocean Grove. I went to his office to ask him if it was necessary—we both objected to going—and he said he thought it was best. And so I went a few days later with my father.

Q. And when was that; about what time?

A. Well, I think it was in June, sometime.

Q. Some time in June?

A. I don't remember the date. I think it was in June I went there. I won't be real sure.

Q. How many times did you go to his office?

A. I went to his office only once.

Q. Was that the only time you ever went there?

A. No. I have been to Mr. McGowan's office a few times.

Q. What for?

A. Well, I don't know. I don't remember what I did go for.

Q. Did you go alone, or with your father?

A. No sir; I went alone. I don't really remember. I know on one occasion I went to his office to see a picture that his daughter had painted and he had hanging in his office. My father had seen it, or some one referred to it, and I went there to look at the picture.

Q. Did Mr. McGowan visit your house; did you ever see him at your father's house?

A. I don't remember. I think he did. If he did, I don't remember.

Q. Well, after you returned to Washington, in October, as you say—as I understand, you say in 1903?

A. 1903.

Q. (Continuing:) You remained here until the time of your father's death; did you?

A. I did; yes sir.

Q. And was Mr. Grant Parish here then?

A. Yes.

Q. During all that time?

A. You mean all that time up to my father's death?

Q. Yes. After you came back from Ocean Grove, until your father's death?

A. Well, he was out of the city a few days on business.

Q. Well, he was living here with you?

A. He was living here; yes sir.

Q. And where was your brother during that time?

A. My brother?

Q. Yes; your other brother.

A. Well, I don't know whether he was in Madison at that time, of not. I know he was at different places, and know at the time of father's death he was in Philadelphia. Whether he was there at the time you refer to, or not, I really do not know.

Q. During the time up to your father's death, what were the relations of James to yourself and Grant. Were they kind and friendly?

A. Yes sir.

Q. With both?

A. As far as I know. It was with me and, as far as I know, with Grant.

Q. As far as you know, they were with Grant?

A. As far as I know.

Q. That is, you didn't know of any quarrel?

A. No; I didn't know of any quarrel.

Q. What do you know of the making of one or more wills by your father?

A. I only know of one.

128 Q. And which one was that?

A. That was my brother Grant was executor.

Q. Do you know when and where that was?

A. No sir.

Q. When did you first see it?

A. Well, I don't know that I ever did see it.

Q. What knowledge did you have of it, then?

A. I think I heard my father say—I am not quite sure I did—that he made Grant his executor.

Q. When did you hear him say that?

A. I suppose it was at the time it was done.

Q. At the time what was done?

A. The time he wrote the will. I really do not know.

Q. When was that?

A. I really can't say.

Q. What year was it?

A. It is of no use for me to guess; I really don't know.

Q. You can state your memory, if you have any memory about it.

A. Well, I really can't remember. I really do not know.

Q. Do you know now—have you any means of knowing when the will that you speak of was made?

A. Why, I suppose the record will show.

Q. I am asking your recollection, if you please—what you recollect about it. You speak here of his will and you say he spoke of it to you?

A. He may have.

Q. Yes.

A. He spoke of it, but I don't know—

Q. When?

A. I don't remember; I really do not know.

Q. Did you know of his making a will prior to that time, in which Mr. McGowan was executor?

A. I never knew of that will.

Q. You know of it now?

A. I learned of it after father's death.

Q. You never heard of it before?

A. No sir.

Q. Your brother was the executor in that will—you have seen it. Have you ever read the will?

A. No sir.

Q. You have never read it and don't know anything of its contents?

A. You refer to Mr. McGowan's?

A. Yes.

A. No sir.

Q. Did you know anything of the will made previously, in 1902, in which Grant Parish was executor?

A. Unless it was the one that you referred to. As I said, I don't remember of it. I don't know of any will prior to that.

Q. How many wills do you know of?

A. I learned there were three, after father's death.

Q. Have you read them at all?

A. I have read mine.

Q. The last one?

A. The one he left me; yes sir.

Q. When did you know personally of his having made the will making you executrix?

A. Several days after his death.

Q. Where was the will found?

A. Well, I was looking through my father's papers to find some letters, or addresses of our relatives who lived in California and the west—Ohio—and I came across the will.

Q. Where was it?

A. It was lying among his papers in a drawer.

Q. That was the first time you had seen it?

A. The first time I had ever seen or heard of it; yes.

129 Q. Then there were, as we know and as you know now, two wills before that, one made in November, 1903, in which James H. Parish and Jonas H. McGowan were executors?

A. Yes sir.

Q. And one in June, 1902, in which Grant Parish was executor. You remember that?

A. Yes. I said before I didn't remember the date. I said I didn't see the date—in 1902; August? I really don't remember.

Q. Do you remember now if that was the date?

A. I don't know whether it was or not. I never did know the date.

Q. Did you know where those other wills were?

A. No sir.

Q. You never saw them before your father's death anywhere?

A. No sir.

Q. You never knew anything about them?

A. No sir.

Q. When you qualified as executrix, what did you do as executrix after your father's death, in respect of this claim. What was the first thing you did in respect of the claim known as the ice claim?

A. Well, it was some time before we did anything.

Q. Who do you mean by "we"?

A. Well, before I did anything.

Q. Mr. Grant Parish was living in the house with you?

A. Yes sir.

Q. You consulted with him?

A. I did. It was very natural that I should; he was one of the heirs.

Q. I am merely asking for the fact.

A. I did.

Mr. CONRAD: She has a right to make an explanation, Mr. Wilson.

Mr. WILSON: Entirely so.

By Mr. WILSON:

Q. When did your brother James die?

A. I think he died in 1908.

Q. He was living at the time your father died?

A. Yes sir.

Q. Did you consult with your brother James?

A. Why, no; I did not know anything about it. There was nothing said about wills, or anything.

Q. I ask you if did consult with your brother James?

A. About what?

Q. About the will.

A. About what will? I don't know what will you refer to.

Q. I ask you if you consulted with your brother James about the will of your father, and what he had done by you as executrix.

A. I don't know. At the time my brother James was at home? I didn't find it for several days after that.

Q. Did you find it, and after reading the will, consult with your brother James?

A. I did not; no sir.

Q. Did you consult with your brother Grant?

A. It was filed—we had Mr. Potbury to file the will. That was about all there was.

Q. I ask you if you consulted with your brother Grant.

A. About what?

130 Q. About the provisions of the third will, and about the ice claim particularly?

A. No sir. There was nothing said about the claim at that time.

Q. What was the condition of the claim at that time?

A. Well, as far as I—to my judgment, I thought the claim was dead; there was nothing.

Q. What made you think so; who advised you so?

A. No one.

Q. Who did you ask about it?

A. I didn't ask any one. From the fact that Secretary Shaw had decided against the case, I thought it dead.

Q. You thought that the claim was dead?

A. I did.

Q. And when did you find out that it was alive?

A. Why, it was some time before I found that out.

Q. Well, when did you find out that it was alive. What was the first evidence of life that you saw?

A. Well, it was quite a long time afterward. I think it must possibly be nearly a year. I don't remember how long before we employed—I employed—Major Conrad.

Q. For a year, you rested in the belief that the claim was dead, and you got and sought no advice about it from anybody; is that so?

A. No; we didn't do anything with the claim for quite a long time.

Q. Mr. McGowan was then living?

A. Yes sir.

Q. At that time, did you know Mr. Brookshire who is here?

A. Yes; I knew Mr. Brookshire.

Q. You knew him to be concerned in the case?

A. Well, I know he was. I didn't know that he was at that time; I didn't know any of them were.

Mr. CONRAD: Wait a minute. What was that?

The WITNESS: I said I didn't know Mr. Brookshire was concerned in the case at that time. I didn't think any of them were. I thought the case was dead, that is all.

By Mr. WILSON:

Q. That is what I want. Now, what produced that conviction in your mind, that the claim was dead. I want to know, particularly, whether you asked Mr. McGowan or Mr. Brookshire if it was dead?

A. I did not; I had no reason to ask them.

Q. Without reference to your reasons, I would like to ask you as a matter of fact if you ever sought any advice or information from Mr. McGowan or Mr. Brookshire?

A. No, sir; it was not my place. It was their place to communicate with me.

Q. Did you ask any other attorney, during that year, about the condition of the claim?

A. I don't remember that I did.

Q. Was it merely your own conviction—your own opinion—that the case was dead, that prevented you from taking any action for a year? Or did you get advice from somebody else that it was not dead.

A. No sir. I had no advice from any one that I know of; I never talked to any one, that I remember.

Q. You sought no advice, and talked to no one, for a year?

Mr. CONRAD: She didn't say that. She said she hadn't any sort of advice.

By Mr. WILSON:

131 Q. You did not seek any advice for a year?

A. I don't remember anything. I didn't make any attempt for about a year.

Q. Well, from whom did you first seek advice?

A. Well, I didn't have advice for any—

Mr. CONRAD: Read the question again. You didn't catch the question, Miss Parish.

(The question referred to was read as follows:)

"Q. Well from whom did you first seek advice?"

A. Well, I thought at that time of Mr. Cole and Mr. Donaldson, and I asked my brother to call on Mr. Cole—Judge Cole—and make an appointment, and he did. Judge Cole said he was very busy at that time, but as soon as he had leisure to take it up and look into the matter, he would make an appointment and I would go to his office. He did make an appointment, and I went to keep the appointment, and Judge Cole had died, and so I never met Judge Cole or had any advice from him.

Q. Who did you see there at his office?

A. I met a lady at the door. I suppose she was his stenographer; I don't know who she was.

Q. Did you see Mr. Donaldson?

A. No, sir.

Q. When was that approximately?

A. I don't remember the exact time.

Q. Well, what month?

A. I can't say.

Q. What year?

A. In 1905, I think, as near as I can remember.

Q. When was the will probated?

A. Well, I think in April. I don't remember the exact date; the record will show that.

Q. In what year?

A. 1905.

Q. Who represented you then, in the probate of the will?

A. Mr. Potbury.

Q. That was in the early part of 1905?

Mr. ROBINSON: She answered the question, and said April.

Q. It was the early part of 1905; is that so?

A. As near as I know, it was April, I think.

Q. That is your best recollection, that it was in April, 1905.

What did you do after that, with reference to this claim; what is the first thing you did after that?

A. After what?

Q. After April, 1905.

A. I just stated that I was going to consult Judge Cole——

Q. I know; but after that, after Judge Cole's death?

A. After that?

Q. Yes.

A. I didn't do anything for awhile.

Q. For how long?

A. Along in that fall.

Q. Who did you next consult?

A. I didn't consult any one right away; I didn't know exactly who to go to.

Q. I am asking you who did you go to finally; who did you next consult?

A. I next consulted Major Conrad.

132 Q. When and under what circumstances?

A. Well, I had heard of Major Conrad.

Q. When?

A. Oh, for some time—by reputation.

Q. You had known him for some time?

A. No, not known him; no sir, but I had known of Major Conrad.

Q. I ask you, again, when and under what circumstances you first sought advice and went to Major Conrad. That is plain.

A. Well, I had to have some one to consult, and I went to Major Conrad as the next one.

Mr. WILSON: Repeat that question again. We are spending a great deal of time. That is not what I asked the witness.

Mr. ROBINSON: I think the witness is trying her best to answer.

(The question was read by the stenographer as follows:)

"Q. I ask you again, when and under what circumstances you first sought advice and went to Major Conrad. That is plain."

A. I have already said that I had to have some one, and heard of Major Conrad. I asked my brother to call on Major Conrad and state the case to him, and he did; and Major Conrad made an appointment for me to call at his office, and I called and made arrangements for him to take charge of the case.

Mr. WILSON: Be good enough to read the question again, and you be good enough to listen to it.

The WITNESS: I am answering the question the best I can.

(The question was read by the stenographer as follows:)

"Q. I ask you, when and under what circumstances you first sought advice and went to Major Conrad. That is plain."

By Mr. WILSON:

Q. You understand what I mean, when I ask you when you first went to see him; and if you do, please answer that question.

A. You mean what time of the year? Is that what you mean?

Mr. CONRAD: Yes.

A. (Continuing:) I think I went to see Major Conrad that fall. I say in the fall; I don't remember the exact date; no, sir, I don't.

Q. It is only necessary for you to answer the question to the best of your ability, and when I ask you, when I would like an answer.

Mr. ROBINSON: She has given her answer, and it is the best that could be expected.

By Mr. WILSON:

Q. Who came with you to see Major Conrad?

A. My brother.

Q. Did you visit him here at his office.

A. Yes, sir.

Q. That is the first time you ever saw him?

A. Yes, sir; the first time I ever saw Major Conrad.

Q. And then the contract was entered into?

A. Yes, sir.

Q. Between him, and you as executrix?

A. Yes, sir.

Q. Was that the first and last contract that you made with him; is that the only contract made with him in regard to services?

133 A. Well, I don't know that that was anybody's affair but ours.

Mr. CONRAD: You answer the question, Miss Parish.

The WITNESS: Will you please ask it again?

Mr. ROBINSON: He is asking about this case—if there was any other contract about this case.

The WITNESS: You mean about prosecuting the claim?

By Mr. WILSON:

Q. Yes.

A. I only had one contract with Major Conrad.

Q. That is the one—you say you made one?

A. In November, some time, I think, I don't remember the exact date, November, I think.

Q. Was it 1905, or 1906?

A. 1905.

Q. At the time of your father's death, what was his condition financially, and what was yours?

A. I decline to discuss our private affairs; I don't think that has anything to do with this case. That is our own private affair.

Q. You have stated, in reply to a question on direct examination, that you, at no time since your father's death have been insolvent and unable to pay your debts?

A. No, sir.

Mr. CONRAD: That is what you charge in the bill.

Mr. WILSON: Yes.

By Mr. WILSON:

Q. At the time the bill in this case was filed, you had not received the proceeds of this claim; had you?

A. Please repeat that; I didn't catch that.

(The question was repeated by the stenographer as follows:)

"Q. At the time the bill in this case was filed, you had not received the proceeds of this claim; had you?"

A. Why, I had received it; certainly.

Q. When the bill was filed?

A. Yes, sir.

Q. When this bill was filed, do you remember how you became a defendant and how you were served with process?

A. Well, I don't know as I understand your question.

Q. How were you made a defendant in this case? (After a pause.) Do you know; you are the executrix of this estate—you are the defendant in this suit, aren't you? Do you understand that?

A. The first I knew of it was when they filed the bill.

Q. How did you hear of it?

A. Why they called at the house.

Q. Who?

A. I don't know who; Mr. Morey and some other gentleman, I don't know who he was.

Q. Well, do you remember when that was?

A. No, sir; I don't.

Q. You don't remember when?

A. I don't remember exactly; no, sir.

Q. Do you remember being served with process?

A. Yes, sir.

Q. When was that?

A. I don't remember.

134 Q. Where were you served?

A. Where?

Q. Yes.

A. I was served on the street car, probably, if that is what you mean.

Q. You were served on the street car?

A. Yes, sir; if that is what you mean.

Q. I mean when and where were you served with process and how? Do you recollect how you were served with process?

A. A gentleman came in and asked me if I was Miss Parish?

Q. Where?

A. In the street car.

Q. In the street car?

— Yes.

Q. Whereabouts were you going on the street car, or where were you when you were served?

A. On the car.

Q. Whereabouts?

A. I don't know exactly where.

Q. Near your house?

A. I don't know whether it was near or not; I don't remember just where the car was.

Q. Did the officer who served you come in and sit down by you?

A. Yes, sir.

Q. And asked what?

A. He asked me if I was Miss Parish.

Q. You remember that?

A. I remember that.

Q. And you said you were?

A. I did not.

Q. What did you say?

A. I said I declined to have any conversation with him.

Q. Did he leave a paper with you and walk out of the car? Have you got the paper that he served on you?

A. I have; yes.

Q. Let me have it. Now, I ask you how far that was from your house.

A. I don't know.

Q. Give us an idea. Within a square or ten squares?

A. Within a square—I really can't say: I don't remember.

Q. What street do the cars run on; you live on A?

A. The cars run on East Capitol—they run on several.

Q. Well, where were you served. Where was the car on which you were; what street does that run on?

A. It runs on a good many.

Q. What street was it running on when you were served with process?

A. I really can't say.

Q. How long had you been on that car?

A. Not a great while.

Q. You had left your house?

A. I had.

Q. And where did you get on the car?

A. Well, I don't know whether I got on the car at 3d Street or Second; I really don't remember—it was one or the other.

Q. What time was it when you left your house?

A. Well, that I do not know. It was in the afternoon; the early part of the afternoon.

Q. The early part of the afternoon?

A. Yes, sir.

Q. Who did you leave in the house?

A. No one.

Q. You left it alone?

A. There was no one in the house when I left it.

Q. Who had been in the house before?

A. I had.

Q. All day?

A. No; not all day. I was out in the morning.

Q. You spoke something about Mr. Morey coming there; didn't you, with some man, to the house?

A. Yes. Mr. Morey came with this gentleman, to my house.

135 Q. How do you know that?

A. Because I saw him.

Q. Where?

A. I saw him from my room.

Q. The officer came to your house; to what door, the front door?

A. Yes, sir.

Q. And did he knock?

A. Well, I don't know whether he knocked or rang the bell.

Q. Did he ring the bell?

A. Either one or the other; yes, sir.

Q. And who went to the door?

A. I did.

Q. And did he ask you if you were Miss Parish?

A. He did.

Q. And what did you say?

A. I told him no.

Q. And shut the door?

A. I certainly did shut the door. He went away and I had no reason to leave the door open.

Q. Was that true, what you told him?

A. I can explain that matter.

Q. I ask the question. Then you can explain it.

Mr. ROBINSON: The witness is now asked the question whether it is true or not. Just explain why you said that, Miss Parish.

By Mr. WILSON:

Q. Was that true, what you told him?

A. Certainly; I was Miss Parish. Now, I would like to make a statement.

Q. Make all the explanation you desire.

A. I had no idea who the gentleman was, or what his purpose was. He came to the house first, alone, and Mr. Morey was not with him. I thought that the gentleman was an entirely different party, and had nothing whatever to do with this case, and I didn't care to see him; and I told him I was not Miss Parish. That is the reason; I didn't know who the gentleman was, or his purpose. Otherwise, I would have said yes. Otherwise, had I known who that gentleman was, and his purpose, I should have said yes and received the paper, for I had no reason to avoid it. That is my explanation.

Q. Did you tell the officer that Miss Parish was in New York?

A. I did; because I had expected to be in New York.

Q. You had?

A. I had; but I didn't get there until a few days later.

Q. Had you made arrangements to go to New York?

A. I had.

Q. What arrangements had you made?

A. Well, I had planned to go and didn't get away when I expected.

Q. Where was Grant Parish at that time?

A. As near as I can remember, he was at home.

Q. In the house?

A. In the city.

Q. In the city, but not in the house there with you?

A. No, sir.

Q. You were alone?

A. I was alone in the house.

Q. Had you, at that time drawn the money from the United States—the proceeds of this claim?

A. Yes, sir.

Q. Where was the money?

A. That is my affair.

Q. I beg your pardon, but it is not your affair.

Mr. CONRAD: Oh, answer it.

A. That is my affair, where the money was.

Q. Will you answer it or not?

A. I say, that is my affair, where the money was at that time.

136 Q. You had received it?

A. I had received it.

Q. When had you received it?

A. I don't remember. June, I think it was; I really don't remember.

Q. I ask you again, Miss Parish—This summons was served on you (it was issued on the 22d of May)—it was served on you, or returned by the Marshal as served on you on the 22nd day of May, the same day?

A. In May?

Q. 1909.

A. I said, I don't remember when it was served.

Q. You don't remember when it was served, but you said that when it was served you already had the money, and decline to say where it was?

A. I say I don't remember when that was served. I think it was later.

Q. You decline to state where it was?

A. Well, at that time I had not received the money—in May.

Q. Then you were mistaken in that, absolutely, weren't you?

A. Well, if that summons was served in May, I was.

Q. I don't want you to be under any misapprehension. These are facts.

A. I won't say that it was.

Q. I say, you were served on the 22d of May?

A. At that time I had not received the money.

Q. You had not received the money at that time?

A. No, sir.

Q. I want to ask you—Of course the bill was filed before this, and I want to ask you of what your property consisted when this paper was served on you, and what the property of the estate consisted of. You have said that you were not insolvent, and I ask you what your property consisted of and what property belonged to the estate on the 22nd of May.

Mr. ROBINSON: You are mixing her property with the property of the estate.

Mr. WILSON: She knows what I mean.

A. My house.

Q. Anything else?

A. No, sir.

Q. What belonged to the estate?

A. There was nothing then, but the money.

Q. Absolutely nothing; is not that true?

A. As far as I know; nothing.

Q. Isn't it true that there were great number of claims against the estate—a great many creditors of the estate at that time?

A. I don't know that there were a great many; there were claims.

Q. Amounting to how much, approximately?

A. I don't know; I never counted it up.

Q. You have no idea? Didn't it amount to thousands of dollars?

A. Several thousands of dollars, I don't know how much.

Q. And the claims were for various amounts—subsistence, groceries and other things; were they?

A. I decline to discuss our private affairs. I don't think that has anything to do with the case.

Q. Isn't it true that except the proceeds of this claim, the estate of which you were executrix had not one dollar of assets and was largely indebted? Is not that so?

A. I don't know that it was largely in debt.

137 Q. Not largely in debt. Didn't you have one bill for groceries amounting to several thousand dollars?

A. I decline to discuss our private business.

Q. You decline to answer the question?

A. I decline to discuss our private affairs.

Q. What had you, yourself?

A. I had my home.

Q. In the way of assets?

A. I had my home.

Q. That house?

A. Yes, sir.

Q. Did you have any furniture?

A. Yes.

Q. Anything else?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. Was there any mortgage on the house?

A. No, sir—at what time was there mortgage on the house?

Q. May, of this time.

A. What year?

Q. When you were served—when you became a party to this proceeding, just before you got this money.

A. No, sir; there was no mortgage on the house. In—

Q. Didn't you pay the mortgage off after you got this money?

A. There was no mortgage on my house at that time.

Q. There had been one?

A. I decline to discuss my private affairs, sir.

Q. Did you ever make a deed to this property?

A. Ever what?

Q. Ever make a deed to anybody. Did you make a deed to Grant?

A. I did.

Q. When?

A. I don't remember.

Q. How did the title get back to you?

A. He gave it back to me.

Q. When?

A. That I don't remember, either.

Q. Why did you make the deed?

A. Well, I don't remember.

Q. And you don't remember when you made it?

A. No, sir.

Q. Did he ask you to make the deed?

A. Well, I decline to discuss it any further. I don't think that has anything to do with the case; that is my own private affair.

Q. I will ask you to examine, now, the signature to this letter that I have shown you, dated October 25, 1903. It is dated Asbury Park, and purports to be signed by J. W. Parish. Do you recognize that signature (handing paper to witness)?

(After a pause.)

Mr. CONRAD: Don't read the letter; just answer the question.

A. That looks like father's signature. That don't; not that one (indicating). This looks like father's signature (indicating).

Q. The signature to the letters?

A. Yes, sir.

Q. It is his, to the best of your knowledge?

A. To the best of my knowledge it looks like his writing.

Q. Have you read this letter?

A. No, sir.

Q. Read it, if you please.

A. (After reading letter:) Well, all I have to say is I never knew he wrote that letter; I knew nothing about it.

138 Q. I didn't ask you to express your opinion about the letter. I asked you to identify the signature.

A. I say, it looks like my father's signature.

Q. Now, I will read it to you.

(Reading:)

"ASBURY PARK, Sunday Evening, Oct. 25, 1903.

Hon. J. H. McGowan.

MY DEAR SIR & FRIEND: With this mail Emily writes you about returning to Washington last of this week if our business there remains unchanged. I think it would — for the best for her to go. I want you to see her and have a talk with her on the line I now write you for I am sure I can 'hold the fort' and in the meantime will be duly prepared for any emergency.

If Emily will see the policy for us three to pull together on whatever settlements are made it will be the wisest act of her life to do so. Grant is in no sense in a fit state of mind to take part in what is and should be done. His warped mind and injudicious temper inspired by Satan unfits him to do justice to any one and for his own good and for Emily comfort and for humanity She should be glad to become a guardian in some form. Now you have the gist of my mind and (I) know Jim would be glad to know of this proposition. You need not answer this just now but wait until you have a conference with her if she does go to Washington.

I am in good health and lot of courage of high grade.

I see by the papers that Cullom and the President is on good terms. I thought ere this the Senator would write me if he had met Mr. Tracewell. It seems to me Senator Cullom could put some

sort of a brace on the Comptroller that would expedite action if there is no sort of a conspiracy being materialized.

Yours in haste,

J. W. PARISH."

Mr. WILSON: I offer this letter in evidence.

(The letter so offered was filed and marked "Complainants' Exhibit No. 20", and is as above recorded.)

Mr. CONRAD: Who is that to?

Mr. WILSON: J. H. McGowan.

By Mr. WILSON:

Q. I will ask you, in regard to the letter itself, whether it is not in his handwriting—all of it?

A. It looks like it; yes, sir.

Q. When this letter was written, where were you? It is dated Asbury Park, October 25, 1903; where were you?

A. I was at Asbury Park.

Q. With your father?

A. Yes.

Q. Is Ocean Grove near by?

A. Yes, sir. Well, we left Ocean Grove because they closed the house, and we went to Asbury Park, to the Victor Hotel.

Q. The railroad station is the same one for both places?

A. Yes.

Q. This is on the 25th of October. When did you come 139 to Washington after that time?

A. Well, I don't remember. It was the very last days of October; I can't say exactly what date.

Q. Did you come home soon after that?

A. Yes, sir.

Q. How soon?

A. Well, I just said I couldn't remember the exact date. It was the very last of October; I don't remember the date.

Q. Did you see Mr. McGowan when you came home?

A. I did not.

Q. You did not?

A. No.

Q. What is referred to here as being the settlement that was to be made, and the acts which he considered "the wisest act of her life" for you to do? What is referred to there?

A. I don't know.

Q. Had you been in consultation with him at all in regard to settlements, or the disposition of the money from this claim?

A. No, sir. Father never communicated his thoughts or ideas to me in regard to that.

Q. He never told you, or expressed to you any such concern as to the unfitness of Grant to be your adviser or guardian?

A. Grant never was my adviser or guardian.

Q. That is not the question.

A. No sir; he never did.

Q. He never expressed anything but confidence in Grant and the highest esteem and affection for him?

A. I never heard him say anything about Grant.

Q. You never heard him say anything about Grant?

A. No, sir.

Q. He speaks here of "his warped mind and injudicious temper inspired by Satan." Did he ever express to you any such fear or apprehension about Grant?

A. I never, in my life, heard my father use such terms in regard to Brother.

Q. You never what?

A. I never in my life heard my father use such terms in regard to my brother.

Q. And, as far as you know, your father had entire confidence in your brother, in regard to temper and capacity to take care of you?

A. I didn't just catch the last of that.

Q. "To take care of you," he says here.

A. To take care of me?

Q. Yes.

A. I don't know anything about that.

Q. Or, of your ability to take care of him?

A. (Continuing:) I don't need anyone to take care of me, I can care for myself.

Q. If this letter expressed his views about Grant, you know nothing of them, and never heard him say or express any views of that kind?

A. I never heard my father express himself in that way in my life.

Q. You never knew your father had any such opinions?

A. I never knew he had.

Q. Never did?

A. No, sir.

Q. Your father was an entirely truthful man, was he?

A. As far as I knew, he was.

Q. And he considered Grant in all respects entirely reasonable and normal?

A. Did I?

Q. I say, did he?

A. I say I never heard my father say.

Q. You never heard your father express any opinion whatever about his mental qualities.

A. I do not know that he meddled.

140 Q. Mental.

A. Oh, mental.

Q. His mental qualities, or temper?

A. Oh, I heard him say he had a temper and swore. That is about all I ever heard Father say, that he wished he wouldn't swear.

Q. He never spoke about him to you as being "inspired by Satan?"

A. Never in his life.

Q. Or "unfit to do justice to any one"?

A. No, sir; I never heard my father say that.

Q. I ask you, now, was there not on the part of Grant a most violent dislike of his brother?

A. No, sir.

Q. What?

A. No, sir.

Q. There was not?

A. Not that I knew of. If there was I never heard him say so.

Q. Do you know your brother's handwriting?

A. My brother James, you mean?

Q. Yes; your brother James.

A. Yes, I think I do. I have seen enough of it.

Q. Was there not, on the part of Grant, before your father's death, for some time, a most violent dislike and anger and antagonism towards Mr. McGowan and Mr. Brookshire?

A. I do not know.

Q. You never heard him express himself as against any of them?

A. I never heard him express himself in such terms.

Q. Have you ever heard him speak of them?

A. Not very often.

Mr. CONRAD: Suppose you put it "approval" or "disapproval."

Mr. WILSON: I beg your pardon, but I can't accept the suggestion.

By Mr. WILSON:

Q. Have you any knowledge now, or recollection, of any declaration of Grant to you in respect to Mr. McGowan and Mr. Brookshire and their services in the case, and a determination—his determination—that they should be excluded and never get a cent? Did you ever hear him say anything about that?

A. No sir; I never heard him say.

Q. You never have?

A. No.

Q. You have stated, in answer to my questions in regard to the various moneys that were received by you from time to time from Mr. McGowan, that you have no idea how much they amounted to.

A. No, sir; I never counted it up.

Q. You have no idea within \$500, or a thousand dollars?

A. No sir.

Q. And never have?

A. I never have.

Q. Have you ever made any provision or arrangement for the payment of whatever you got from him—to return it to him?

A. I had no reason to; the debt was not mine.

Q. The debt was the debt of your father?

A. The debt was the debt of my father.

Q. As executrix of your father's estate, and having in your possession the proceeds of this claim, have you ever made any inquiry

141 of him, during his life, or of his widow or daughters since his death, as to the amount of money received from him, and made any offer for the payment of the whole or any part of it?

A. No, sir.

Q. No; absolutely. You didn't consider yourself as indebted to them?

Mr. CONRAD: I object to that.

A. I said the debt is not mine.

Q. The debt is not yours?

Mr. CONRAD: Did you ask the witness if she considers herself indebted to them.

Mr. WILSON: Yes. I got that suggestion from you, because you went at great length into the question here about her mental condition.

Mr. CONRAD: Her mental condition?

Mr. WILSON: Yes; her mental attitude.

By Mr. WILSON:

Q. From your knowledge of your father's temperament and character, will you please state whether, according to those characteristics of his, he would now, if he were alive, refuse to acknowledge and pay or provide for the payment of the money that you or he obtained from Mr. McGowan?

A. I really can't speak for my father; I don't know.

(Thereupon, at 5.30 o'clock, p. m., the further cross-examination of this witness was adjourned until Tuesday, May 3, 1910, at 3.30 o'clock P. M.)

E. L. WHITE,
Examiner in Chancery.

WASHINGTON, D. C., TUESDAY, May 10, 1910.

3.30 o'clock p. m.

Met, pursuant to agreement, at the office of Holmes Conrad, Esq., in the Home Life Building, the meeting fixed for May 3, 1910, having been passed by consent.

Present on behalf of the plaintiff McGowan, Mr. Nathaniel Wilson.

Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant, Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Whereupon Miss EMILY E. PARISH resumed the stand for further cross-examination.

By Mr. DARLINGTON:

Q. Miss Parish, you were present at the testimony given by your brother, Grant Parish, in this case; were you not?

A. Yes sir.

Q. Do you recall his statement that you and he found, among your father's papers, a copy of the letter written to Mr. McGowan and Mr. Brookshire shortly before his death?

142 A. What letter do you refer to; what is the letter about.

Q. Do you remember finding among his papers a copy of the letter addressed to Mr. McGowan and Mr. Brookshire, in October, or about that time, before his death, in 1904?

A. Well, I don't know which letter you are referring to.

Q. Did you find more than one?

A. I don't know that I did; I don't understand your question.

Q. I refer to the letter of November 22, 1904, copied in the record of the previous testimony at page 29, which I hand you (handing testimony to witness).

A. (After examination:) Yes.

Q. You remember finding a copy of that?

A. Yes, sir.

Q. About how shortly after his death?

A. Why, I don't think—I really do not know. It was a copy—well, I can't say when.

Q. Kindly approximate it as nearly as you can.

A. Why, it is impossible. I only could guess, and I won't do that, because it simply is impossible for me to say.

Q. Did you not find it when you were looking through the papers to find the will?

A. When I was looking for the will? I wasn't looking for a will. I was looking for some letters, as I stated before, to get some addresses so I could write to some of our relatives and advise them of his death.

Q. Can't you come within twelve months of the time when you found this letter?

A. No; I can't say when I found it, but it must have been when I was looking for papers for Major Conrad. I don't know of any other time; I really don't remember.

Q. You heard your brother's testimony about finding this paper, did you?

A. I don't remember, Mr. Darlington.

Q. You don't remember?

A. No, sir; I don't remember. I have not read it.

Q. When did you first know Mr. Brookshire?

A. Well, I can't say, really. But the first recollection I have now—I might not be correct—but the first recollection I have, I think my brother and myself were going on a trip up to Great Falls and I think Mr. Brookshire was with the party—was on the boat; a little electric boat. I think that is the first time I ever met Mr. Brookshire, as near as I remember.

Q. Do you know whether he was at that time representing your father's ice claim?

A. I don't know.

Q. Did you ever see him at your house?

A. Not to my knowledge. I don't remember of ever seeing him there, if he was ever there.

Q. Do you, or do you not, remember an interview at your house between your brother Grant, Mr. Brookshire and yourself, on or about October 18, 1902?

A. Indeed, I do not; I have no recollection whatever of Mr. Brookshire calling at that time.

Q. Please look at the paper I now hand you and state in whose handwriting is the ink portion (handing paper to witness)?

A. (After examination). Is the what portion?

Q. The part that is in ink.

A. That is my brother Grant's, as near as I can say.

143 Mr. DARLINGTON: Gentlemen, I offer this in evidence—only the ink portion.

The WITNESS: I have no recollection of Mr. Brookshire calling at the house—I do not know that he did.

Mr. CONRAD: You offer only so much of it as is in ink?

Mr. DARLINGTON: Yes. I would like to have it all copied in the record, and I offer to prove the balance of it later.

(The paper so offered was marked "Plaintiffs' Exhibit No. 21", and is as follows:)

"217 A St. S. E., Capitol Hill,

WASHINGTON, D. C., —, 1902.

Dear Mr. Brookshire:

Will you kindly call at the house say at 3 P. M. Friday not before that hour.

I have been very sick & possibly to- weak to come *come* down town.

Yours,

GRANT PARISH.

(Pencil memorandum:)

Oct. 17" 1902.

Over.

I went to see Mr. Grant Parish on Saturday, Oct. 18th, 1902."

By Mr. DARLINGTON:

Q. Do you remember that Mr. Brookshire called at your house and saw your brother and discussed with you the compensation he was to receive to represent the ice claim?

A. On what occasion?

Q. On or about October 18, 1902?

A. No sir.

Q. And called pursuant to this invitation of your brother?

A. I have no recollection whatever of Mr. Brookshire ever calling at my house, or of ever having had any conversation with him about my father's affairs.

Q. By way of refreshing your recollection, do you recall his stating to you that Mr. McGowan had agreed to give him 5 per cent of his, Mr. McGowan's, fee and after considering how much he would like in addition, Mr. Brookshire thought he ought to have 10 per cent from your father, making 15 in all?

A. No, Mr. Darlington, I do not think that was ever discussed. I have had no reason to talk to him about my father's affairs; I was not the proper one. I have no recollection whatever of it.

Q. Did your brother not state to you on that occasion that his father was considering the fee to be paid to Mr. Brookshire and had stated he was going to talk it over with his children before deciding?

A. No sir; I have no recollection.

Q. Do you remember Mr. Brookshire being invited to your house on any other occasion before the letter which I have shown you, and which you have identified as being in your brother's handwriting?

A. No sir. I never invited the man myself, and don't know any one else that did.

Q. Let me show you another letter, and ask if you can state in whose handwriting is the portion written in ink?

144 A. (After examination.) That is my brother Grant's signature.

Q. Do you remember Mr. Brookshire calling pursuant to this invitation, in the month of June, 1903?

A. I do not.

Q. And talking with you and your brother about the ice claim?

A. I do not remember any conversation with Mr. Brookshire on the subject. I do not remember Mr. Brookshire ever calling at our house.

MR. DARLINGTON: I also offer this letter in evidence, and ask that it be copied in the record. I offer to prove all of the letter later.

(The letter so offered was marked "Plaintiffs' Exhibit No. 22," and is as follows:)

"MONDAY.

Mr. Brookshire:

Could you call at the house this Monday evening any time after 5 P. M. by doing so you will oblige

Yours very truly,

GRANT PARISH.

(Pencil memorandum:)

Over: June 22, 1903—4.30 P. M."

By Mr. DARLINGTON:

Q. Did you ever have any correspondence with Mr. Brookshire?

A. Not to my knowledge; I never did.

Q. You don't recollect writing him any letter?

A. No sir.

Q. Did you ever receive any money from him?

A. From Mr. Brookshire?

Q. Yes.

A. No sir.

Q. Either directly, or through your father?

A. No, sir.

Q. Please tell us, if you can, in whose handwriting is this letter I now show you (handing paper to witness).

A. (After examination.) Yes; my father's writing.

Mr. DARLINGTON: We offer this in evidence. It is a letter dated dated July 22, 1903, addressed to Hon. E. V. Brookshire.

(The letter so offered was marked "Plaintiffs' Exhibit No. 23," and is as follows:)

"The Ardmore, 8 Ocean Pathway, Fourth House from the Beach.

OCEAN GROVE, N. J., July 22, 1903.

Hon. E. V. Brookshire.

MY DEAR SIR: Yours of 20th inst. also the 21st containing P. O. order for \$50.00 duly received and note content. I turned the money over to Emily who is the Treasurer and paymaster of this Department. Much oblige- to you for your assistance in the matter. If Mr. Morey returns to-morrow and (is not) in good health suggest that he come here for a week he will be made over. I
145 think you would appreciate a trip here. I think I wrote you that Mr. Springer bought a nice home here and is delighted with the place.

Yours truly,

J. W. PARISH.

Read Echos I sent to you and Mr. Morey see last cover last page."

By Mr. DARLINGTON:

Q. I find in this letter the following: "Yours of 20th inst. also the 21st containing P. O. order for \$50.00 duly received and note content. I turned the money over to Emily who is the Treasurer and paymaster of this Department." Is that correct?

A. I have no recollection, Mr. Darlington, of anything of the kind; no sir.

Q. You were at Ocean Grove, in July, 1903?

A. Yes sir.

Q. That was the time which you have stated Mr. McGowan was sending you \$25 a week?

A. Yes sir; but I never knew any one else sent me money but Mr. McGowan.

Q. Your father was a gentleman who spoke the truth?

A. I think he did, sir, but he was mistaken in the—he was very much mistaken, because there was no money ever given to me. I never had any money except what Mr. McGowan sent—\$25 a week. He may not have intended to do it.

Q. Can you explain the statement, then, not that he was going to turn the money over, but had "turned the money over to Emily"?

A. I think he was mistaken, because I have no recollection.

Q. Had Mr. Brookshire any relation with your father except that of attorney, so far as you know?

A. No. Do you mean, Mr. Darlington, in the ice claim?

Q. I say, was there ever any relation except as attorney.

A. In the ice claim he was one of them. Is that what you mean?

Q. No, the question is whether he had any relation with your father at all except as attorney and client?

A. Not to my knowledge.

Q. He was not attorney for him except in this ice claim?

A. Not that I ever knew of?

Q. Had your father any resources or income in 1903, except the sums he received from Mr. McGowan and Mr. Brookshire, so far as you know?

A. I do not know; no sir.

Q. You didn't know of any?

A. No, sir.

Q. You lived with him?

A. I did.

Q. Had you any source of income then, except your house and what your brother paid you for board, as you have testified?

A. I decline to answer that; that is our private affairs.

Mr. DARLINGTON: Gentlemen, I think we are entitled to an answer.

Mr. CONRAD: I think that is a proper question, Miss Parish.

The WITNESS: What is the question?

Mr. CONRAD: Mr. Darlington has asked you whether you
146 had any sources of income other than those you indicated—
either the house or moneys sent you by your brother Grant.
Had you any other sources of income?

The WITNESS: No sir; I had none for my own use.

By Mr. DARLINGTON:

Q. What income did you derive from your house at that time?

A. It was my home; I lived there.

Q. I know, but what income—

Mr. CONRAD: Money income.

A. No; it was just simply a home, and I lived in at as a home.

By Mr. DARLINGTON:

Q. So that the only income you had was what your brother paid you for board?

A. Yes sir.

Q. How much was that?

A. That was different prices. Sometimes it was more and sometimes less; he always more than paid his board.

Q. Did he pay you board when he was not boarding there?

A. He always sent me money; he never failed when he was away from home.

Q. Did he pay you board while you were at Ocean Grove?

A. No sir.

Q. The house was yours?

A. Yes sir.

Q. And you run it yourself?

A. Yes, sir.

Q. Your father paid no board; did he?

A. My father lived there.

Q. Did he pay you any board?

A. No sir.

Q. Did you conduct the house as yours, from the time you acquired it?

A. Yes sir; I always managed my own home.

Q. How long was that before your father's death; I have forgotten?

A. You mean how long I owned the house?

Q. Yes; how long you conducted the house in the way you have described, prior to your father's death?

A. About twenty-two years.

Q. How many?

A. Twenty-two; I don't remember exactly.

Mr. CONRAD: Twenty-two years previous to the time of your father's death?

The WITNESS: No, up to the present time.

By Mr. DARLINGTON:

Q. That would be about sixteen years; he has been dead about six years?

A. About six years; yes.

Q. Have you filed a claim against your father's estate as housekeeper?

A. Have I filed—

Q. Have you filed a claim against the estate for moneys due you as housekeeper?

A. I don't understand the question.

Q. Have you filed a claim in the Probate Court here, against the estate of your father, for money due you by him?

A. Yes. I had the remainder due me; he paid me some.

Q. For what?

A. For my services.

147 Q. In doing what?

A. Caring for my home, and caring for my mother.

Q. When was that?

A. That was when—I don't remember the year. It was when he got the fifty-seven thousand, I think, or fifty-eight thousand.

Q. When did you render the services in question?

A. Ever since I was eighteen years old.

Q. Who paid Mr. McGowan for his services in defending the suit brought by the creditors, against the house?

A. I didn't know he defended it.

Q. I understood you to say, when Mr. Wilson was cross examining you, that Mr. McGowan acted as attorney.

A. I did, and made a mistake, and when I went home I hunted up the papers and found that Mr. Hazelton had appeared and defended the suit.

Q. And Mr. McGowan did not?

A. No sir. He was a party to the suit. Is that proper?

Q. How do you account for that mistake. Did you not know who your lawyer was?

A. Really, it has been so long, that I didn't think anything about it. I didn't know whether Mr. McGowan was first—really I never thought of it, but I knew Mr. Hazelton was connected with it.

Q. It has not been so very long ago; has it?

A. That I don't know.

Q. You gave 1902, or 1903, did you not?

A. 1892 or three; I don't remember exactly. It has been so long, that really I never thought of it.

Q. When you knew that Mr. McGowan and Mr. Brookshire were acting as attorneys for your father in the ice claim, did you understand that they were doing so as a business matter?

A. Why, I never knew anything about it.

Q. You knew that Mr. Brookshire was a comparative stranger to the family, did you not?

A. I had no acquaintance with Mr. Brookshire.

Q. Did you understand that he was prosecuting that ice claim without some compensation to be received?

A. I didn't understand anything about it. Of course I didn't know anything about it; I had nothing to do with it.

Q. You know that lawyers do not appear in a case without being paid for their services?

A. I suppose they would.

Q. And you supposed there must be some agreement with your father, then, under which they were prosecuting this claim?

A. I didn't know anything about an agreement. I never heard of one.

Q. Your last answer was that you supposed there was.

A. I thought you said "some compensation." I never knew of any agreement.

Q. That there must have been some compensation actually paid, or to be paid?

A. I don't know. I never thought anything about it.

Q. You knew that your father had nothing to pay any compensation with at that time, didn't you?

A. I supposed if he was successful he would.

148 Q. That he would?

A. I supposed so.

Q. When you say you never heard of any contract between them, you mean what—written contract?

A. Yes sir. I never heard of any.

Q. That is, a written contract?

A. No, sir.

Q. But you understood, or presumed, that they would be paid for services if they succeeded in the case; did you?

A. I never thought anything about it; it was not my affair.

Q. From what source, if any, other than the ice claim, did you suppose money was being advanced by Mr. McGowan, and whoever paid it?

A. I didn't think anything about it. It was not my arrangement, or debt, and I never thought of it.

Q. But you knew, did you not, Miss Parish, that your father had no income, and that he had no prospects except this ice claim; that Mr. McGowan and Mr. Brookshire were prosecuting that claim and were advancing money which your father had no means to pay, unless he won the suit; didn't you?

Mr. CONRAD: I note an exception. If I may say it, it is putting words in the witness' mouth. The witness has not stated anything about that.

Mr. ROBINSON: And the additional objection that the whole question is argumentative.

Mr. DARLINGTON: Read the question.

(The question was read by the stenographer as follows:)

"Q. But you knew, did you not, Miss Parish, that your father had no income, and that he had no prospects except this ice claim; that Mr. McGowan and Mr. Brookshire were prosecuting that claim and were advancing money which your father had no means to pay, unless he won the suit; didn't you?"

A. I never knew Mr. Brookshire advanced father any money. All the money that ever I knew of Mr. McGowan advancing to father was the summer at Ocean Grove. I never knew anything about any transactions of business between them.

Q. My question is correct, is it not?

A. I say, I never knew of any money being advanced except by Mr. McGowan.

Mr. DARLINGTON: I will ask the stenographer to read the question again, omitting the name of Mr. Brookshire.

(The question was read by the stenographer as follows:)

Q. But you knew, did you not, Miss Parish, that your father had no income, and that he had no prospects except this ice claim; that Mr. McGowan was prosecuting that claim and was advancing money which your father had no means to pay, unless he won the suit; didn't you?"

A. Well, I only repeat what I said: That I only knew of the money he sent that summer to Ocean Grove.

By Mr. DARLINGTON:

Q. I am not asking what money you knew he was advancing yourself. I am asking this: Did you not know, in 1903 and from 149 that time on, that your father had no income—that is, no property—and that his only prospects was this ice claim; that Messrs. Brookshire and McGowan were prosecuting that claim; that Mr. McGowan was advancing money for him, and that he had no way to repay those advances, or compensating those lawyers, except through this ice claim. You knew all that, didn't you?

A. I didn't know anything about it, Mr. Darlington. I know nothing about my father's affairs.

Q. You did not know that Mr. Brookshire and Mr. McGowan were prosecuting the ice claim?

A. I knew they were his attorneys at that time.

Q. To prosecute the ice claim?

A. To prosecute the ice claim.

Q. And you knew that Mr. McGowan was advancing moneys for you at Ocean Grove?

A. Yes, sir.

Q. You knew that your father had no income?

A. No.

Q. You knew that?

A. Oh, I knew it; yes.

Q. And you knew that he had no property or prospects of paying that money except the ice claim?

A. Yes sir.

Q. And knew he had no means of repaying those advances, or compensating those lawyers, unless he won the ice suit?

A. No sir. As I say, I didn't know anything about it.

Q. From the time your father returned from Ocean Grove until the time of his death, was he not in Washington continually: or do you know?

A. As far as I knew, he was; I don't remember his ever being out of the city.

Q. From the time he came back from Ocean Grove until he died?

A. I can't recall that he was out of the city; yes sir.

Q. Is it your best recollection that he was not?

A. Yes.

Q. Just think a moment, now, and see if you can't recall his being out of the city?

Mr. CONRAD: What year.

Mr. DARLINGTON: From the time he returned from Ocean Grove until the time of his death.

Mr. CONRAD: That is the fall of 1903?

Mr. DARLINGTON: Yes, until his death in 1904.

A. I can't recall his being out of the city.

By Mr. DARLINGTON:

Q. You can't recall any time?

A. No; I don't remember that he was.

Q. Is your memory fairly good?

A. Sir?

Q. Is your memory fairly good?

A. About things I am concerned with. But things I am not, I don't tax my memory with. It is about my own affairs.

Q. In your testimony here in Mr. Conrad's office, on April 27, at pages 221 and 222, you are asked whether, after returning to Washington from Ocean Grove in October, 1903, you remained there and whether your father was out of the city, or whether he remained here from that time until his death, and you answer: "A. Well he was out of the city for a few days on business."

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A. I don't remember that question.

Q. I will show it to you (handing testimony to witness).

A. I don't know where he was. (After examination.) Well, that was not my father; that was my brother Grant.

Q. You refer to your brother Grant?

A. Yes sir. I don't remember my father being out of the city—I have no recollection of it—but my brother was frequently out of the city.

Q. Do you remember whether your father was or not?

A. I say, I have no recollection about my father being out of the city.

Mr. DARLINGTON: I think you are correct; it does appear to refer to your brother Grant.

The WITNESS: Yes; because I have no recollection of my father being out of the city.

By Mr. DARLINGTON:

Q. At page 226, you are asked what was the first thing after your father's death that you did in respect to the ice claim, and you answer: "A. Well, it was some time before we did anything." Is that correct?

A. I do not remember; if it is there——

Q. I don't mean is that answer correct.

A. Oh! please read it again.

Q. (Handing testimony to witness.) It is the first question and answer at the top of the page.

A. (After examination.) Yes sir.

Q. Who is the "we" referred to there?

A. Well, I don't know anybody except my brother.

Q. Which brother?

A. My brother Grant.

Q. At page 227, this question and answer: "Q. Did you consult with your brother Grant? A. It was filed—we had Mr. Potbury to file the will." That is correct, is it not?

A. (After examination.) Yes sir.

Q. Who is the "we" there?

A. I suppose my brother Grant.

Q. And yourself?

A. But my brother acted for me. I think Mr. Potbury—Mr. Potbury called at our house at that time and conferred with me. I am quite sure that anything my brother did was only to take messages I sent to Mr. Potbury.

Q. At page 228——

A. (Continuing:) But I remember distinctly that Mr. Potbury called at the house after I found the will, and we discussed it.

Q. I am not talking about that at all.

A. Oh, I thought you were.

Q. I am asking you who that "we" was. Referring to the period after your father's death, you say at page 228: "I don't know how long before we employed—I employed—Major Conrad." Do you recall why you changed "we" to "I" in that case?

A. That is very natural, Mr. Darlington. I always associate my brother, but he didn't represent me in anything. I remember saying it; yes. It is natural that I should.

151 Q. I will ask you now about the next question and answer on page 228: "Q. For a year, you rested in the belief that the claim was dead, and you got and sought no advice about it from anybody; is that so? A. No; we didn't do anything with the claim for quite a long time." Who is the "we" there?

A. I suppose my brother.

Q. And yourself?

A. I think so.

Q. Why did you think this claim was dead—where did you get the first impression that the claim was dead?

A. Why, when Secretary Shaw rendered his decision against it, I supposed that ended everything.

Q. How long did you continue to think it was dead?

A. Until I made the effort to see.

Q. And how soon was that after your father's death?

A. Well, the first person that I approached was Judge Cole.

Q. Are you sure about that?

A. Why, yes, as near as I remember. I don't remember any one else.

Q. Didn't you send for Mr. McKee, the day after the funeral, about this claim?

A. I did not send for him. Mr. McKee called on me, not the day after, but several days after.

Q. And you discussed the ice claim, then, with him?

A. With Mr. McKee?

Q. Yes.

A. I haven't any recollection of it. Mr. McKee called to pay a visit of sympathy and I haven't any recollection that we did.

Q. My question was, whether you did not send for him within a day or two after the funeral and make a request of him to prosecute the ice claim?

A. No sir.

Q. You did not?

A. I have no recollection of it.

Q. Is your recollection vivid enough and strong enough to enable you to say you did not?

A. I say, I haven't any recollection of talking about the ice claim. I was too distressed to talk about business, and if he mentioned it to me, I don't remember.

Q. My question was, whether you did not send for him and mention it to him.

A. I think Mr. McKee called on me to pay a visit of sympathy, as any others did.

Q. How long after the death of your father was it that you made your visit to Judge Cole's office?

A. Well, the first visit I ever made there was the day he died, to keep an appointment that had been made. I didn't visit there before that.

Q. I know, but how shortly was that after your father's death?

A. I don't remember when he died.

Q. Who went with you?

A. My brother Grant.

Q. Anybody else?

A. To Judge Cole's office?

Q. Yes.

A. No sir.

Q. Did you ever make any other visit there—did not Mr. McKee go with you to the office of Cole & Donaldson?

A. The morning I went to Judge Cole's office?

Q. You say you went there only the one time.

A. No sir. Only my brother and myself.

Q. You only went to Cole & Donaldson's office this once?

A. That is all.

152 Q. And on that occasion Mr. McKee didn't go with you?

A. No sir.

Q. Are you quite clear about that?

A. I am quite clear about that; yes sir.

Q. How soon after your father's death was it that you filed the will?

A. Several days after I found it; I don't remember the date.

Q. If you thought the ice claim was dead, and your father had no other property, why did you file the will?

A. It was my duty to file the will.

Q. Did you employ any attorney at that time to file it?

A. To file the will?

Q. Yes.

A. Mr. Potbury had charge of it.

Q. Why not Mr. McGowan who had been representing your father for so many years, and who had advanced money for you to live on at Ocean Grove?

A. I never thought of Mr. McGowan

Q. How long did you say it was before you no longer thought the claim was dead?

A. Well, I didn't think—I found out the claim was not dead when I got the money; when it was recovered. I didn't know anything; all I could do was to make the effort.

Q. Did you consider it dead until you got the money?

A. I don't know; (after a pause) after the decision of the Supreme Court.

Q. When you said that you considered the claim dead for a long time, you simply meant you had not gotten the money?

A. I thought Secretary Shaw's decision ended it; I didn't know.

Q. And continued thinking that until you got the money?

A. Well, I didn't think anything much about it.

Q. Until then?

A. Until the Supreme Court rendered their decision—I don't know whether I express it properly or not.

Q. You didn't think much about it when you made the contract with Major Conrad to prosecute the suit?

A. Why, yes; of course. But I didn't know.

Q. Miss Parish, I am not trying to confuse or mislead you at all. I only want you to tell us, if you can, how long after your father's death you continued to think this claim dead?

A. I didn't think much about it. I went on and did what I could; that was all.

Q. How long did you go on and do what you could after your father's death?

A. I stated, that the first visit I made to Judge Cole's office was the first effort that I made.

Q. Is your recollection entirely clear that you had no interview with Mr. McKee and asked him to prosecute it before you went to Judge Cole?

A. I have no recollection of having asked Mr. McKee anything of the kind.

Q. What led you to change your opinion and think the claim was not dead?

A. At what time?

Q. At any time. What was the first thing that made you change your opinion and conclude that the claim was not dead?

A. It was my duty to go on, and so I guess—I don't know—I say I never thought much about it.

Q. Your duty arose, though, as soon as your father died and you found you were the executrix; did it not?

A. Yes.

153 Q. And did you proceed to execute that duty as well as you could, from the time you first knew it was your duty?

A. I tried to.

Q. From the time you found the will and saw you were the executrix, you realized you had to do what you could and did it?

A. Yes sir. I knew that father, had he lived, would have made every effort. It was more on that account, I think, because I knew he would have done so and it would have been his wish.

Q. Who first suggested to you going to the office of Cole & Donaldson?

A. I don't know.

Q. I wish you would think, and try and tell us?

A. I had heard of Judge Cole, and I had also heard of others.

Q. But you didn't go to see everybody you heard of; did you?

A. Sir?

Q. You didn't go to see everybody you heard of; did you?

A. No.

Q. My question is, how did you first come to go see Judge Cole?

A. I just happened by there; I guess.

Q. Who first mentioned Cole & Donaldson to you, after your father's death, in connection with the ice claim?

A. I heard of their name as lawyers.

Q. From whom?

A. I don't know—reading of them. Really, don't know. I knew of them just as I heard of you.

Q. Who first spoke to you about Cole & Donaldson in connection with the ice claim?

A. I don't know.

Q. Your brother Grant?

A. I don't know.

Q. Mr. McKee?

A. I didn't have any conversation with Mr. McKee.

Q. About Cole & Donaldson?

A. No sir.

Q. Now what led to your first communication to Major Conrad about this case; who first spoke to you about him in connection with the prosecution of the ice claim?

A. I heard of him myself. I had heard my father and brother tell of him some time before.

Q. My question is, who first spoke to you about Major Conrad in connection with the prosecution of the ice claim, after your father's death?

A. I don't know that any one did.

Q. Who arranged the interview between you and Major Conrad—the first interview?

A. I asked my brother Grant to call on Major Conrad.

Q. What did you ask him to do when he called on Major Conrad?

A. I asked him to state the case to Major Conrad and ask him if he would look into it, and he did.

Q. How did you know that Mr. Morey was with the man who tried to serve the subpoena on you in this case?

A. I saw him.

Q. Where was he when you saw him?

A. I think at the gate—on the sidewalk.

Q. And where was the man?

A. Hammering on the front door.

Q. Why didn't you admit them?

— Why didn't I what?

Q. Why didn't you admit them; why didn't you see them?

A. I couldn't very well. There was no one in the house, and I was getting ready to go out.

Q. Did you go to the door to see them the second time?

154 A. Afterwards I was changing my clothes and couldn't go to the door the second time.

Q. How is that?

A. I couldn't go to the door the second time.

Q. You could?

A. I could not; there was no one in the house.

Q. How many times did they call at the house?

A. I never knew of but that time.

Q. How many times on that occasion?

A. The gentleman called first.

Q. How is that?

A. The gentleman called first—I saw him at the door—and then he went away and came back again with Mr. Morey. That is all I know.

Q. And you recognized him as the same gentleman when you met him on the street car?

A. Yes, sir.

Q. You recognized him on the street car as the man with Mr. Morey; did you?

A. Yes sir.

Q. Why did you refuse to tell him your name on the street car?

A. I didn't wish to have any conversation with him.

Q. Why?

A. I didn't want to talk.

Q. You knew he must have been somebody associated with Mr. Morey?

A. I thought he must be then—he may not have been, however.

Q. Then why did you refuse to have any conversation with him?

A. I had no reason, only as I said, that I didn't wish to have any conversation on the street car. That was not the proper place to talk.

Q. Had you any business in New York at that time?

A. No sir. I was going there on a pleasure trip.

Q. What were you waiting for?

A. It was not convenient about the house, and I couldn't get away just when I had planned.

Q. You said that the claims against your father's estate amounted to several thousand dollars. Is that as near as you can approximate the claims?

Q. Yes.

Q. How much was your own?

A. Against what?

Q. Against the estate of your father.

A. Well, I can't tell you to save my life.

Q. You have a claim against your father, which you preferred, and don't know how much it is?

A. Well, it was several thousand dollars.

Q. How much?

A. Several.

Q. As much as five?

A. Oh, it was more than that!

Q. Was it ten?

A. Now, I don't remember the exact sum.

Q. How could you make a claim against the estate of your father if you do not know how much he owes you?

A. I suppose I did at that time.

Q. How did you ascertain it at that time?

A. Really, I do not know. I suppose by figuring it up.

Q. What did you have to figure by?

A. The years.

Q. How is that?

A. The years.

Q. Which years; how did you know the years?

155 A. Well, from the time I was eighteen *years* old up to the time of father's death. I had received \$4,500—\$6,000—from father, and it was what was left.

Q. That was the bill for acting as housekeeper?

A. I don't know about acting as housekeeper. I never understood it was housekeeping.

Q. Is or is not that the claim you put in?

A. As housekeeper? I didn't know it was housekeeper.

Q. Do you know whether or not that is the claim put in?

A. I know it was my father's contract with me—the remainder of his contract.

Q. A contract to act as housekeeper, or not?

A. I don't know as housekeeper was ever mentioned. The contract was—do you want to know what the contract was?

Q. I have not examined the claim, Miss Parish, but I understand it was housekeeping.

A. I never heard of housekeeper. I will tell you, if you want to know the fact, Mr. Darlington.

Q. Very well.

A. When I was 18 years of age, after leaving school, I wanted to get in the government employ and had a chance. My mother was an invalid all of her life, and my father objected to my going into an office and said if I would stay at home and care for my mother, he would give me \$50 a month, or the equivalent of what I would get in the department, and my clothing. But it was not to act as housekeeper. It was to care for my mother.

Q. What was your age at the time of your mother's death?

A. I think I was thirty-four or five.

Mr. CONRAD: Oh, no—at the time of your mother's death!

The WITNESS: Yes sir.

By Mr. DARLINGTON:

Q. When did she die?

A. My mother died, I think, in 1891 or two.

Mr. CONRAD: I beg your pardon.

The WITNESS: I think I know my age. That is as near as I can approximate it; I can't tell you the exact dates.

By Mr. DARLINGTON:

Q. You said that you did not know whom to consult after Judge Cole's death. Is that correct?

A. Consult about what?

Q. I am inquiring now about your deposition. You have stated that you did not know whom to consult after Judge Cole's death.

A. I hadn't thought much about it.

Q. Had you heard of Major Conrad a long time before that?

A. Yes.

Q. And many other lawyers?

A. Yes. I heard of you too.

Q. Why didn't you consult Mr. McGowan who had had charge of the case so long?

A. I supposed his services had ended when Secretary Shaw rendered his decision. They never approached me; they never communicate with me in any way.

156 Q. Did Judge Cole approach you or communicate with you in any way?

A. No sir.

Q. Did Major Conrad approach or communicate with you in any way?

A. No sir.

Q. You approached or communicated with them, didn't you?

A. Yes sir.

Q. Why didn't you approach or communicate with Mr. McGowan, who had been representing it for so many years?

A. I never thought of it; it never occurred to me. I thought his services were ended and I could employ what counsel I wished.

Q. You knew he had served your father for some time, and had advanced money, and all that, and never thought of consulting him?

A. I knew Mr. McGowan had advanced money to my father, but I never knew their business.

Q. But you knew that Mr. McGowan and Mr. Brookshire had served him in the prosecution of the ice claim; didn't you.

A. I knew they were associated with the claim; yes.

Q. You knew it was through them that the Act of Congress was passed?

A. Yes sir.

Q. And you knew it was through them that the allowance by the Auditor had been obtained; did you not?

A. I knew they had charge of the case at the time.

Q. You did?

A. Yes sir.

Q. And it never occurred to you to consult them about further efforts to secure this money?

A. No sir.

Q. Miss Parish, did you—father ever pay you anything under this agreement to act as housekeeper—I mean this agreement of which you have spoken?

A. I don't understand the question.

Q. Did your father ever pay you \$50 a month, or any part of it, under this contract?

A. Yes; my father paid me \$6,000.

Q. When?

A. As I stated before, when he got the fifty-eight thousand through, I think.

Q. That is the \$6,000 which went into the house?

A. That bought the house.

Q. Yes.

A. Yes sir.

Q. That would be \$50 a month for twelve years?

A. Sir?

Q. That would be \$50 a month for twelve years, wouldn't it?

A. He paid what he could. He didn't say he would pay up every month.

Q. That very nearly covered the whole time before your mother lived after the contract was made?

A. \$6,000?

Q. Yes.

A. I don't know.

Mr. CONRAD: It would be \$7,200.

Mr. DARLINGTON: I said very nearly.

By Mr. DARLINGTON:

Q. Did you have any acquaintance with either Mr. Cole or Mr. Donaldson, before you went to their office?

A. No sir. In fact, I never heard of Mr. Donaldson, but only of Judge Cole.

Q. You had never met him, had you?

A. No, sir, I never met him.

157 Mr. DARLINGTON: That is all.

Mr. WILSON: I have one or two questions which I would like to ask.

Mr. CONRAD: We have no objection.

By Mr. WILSON:

Q. Miss Parish, where were you in the summer of 1902?

A. In the summer of 1902? Why, I do not remember.

— You do not remember?

A. No sir; unless I was at home.

Q. Was your father here with you?

A. As far as I know, he was. I don't remember that he was not here.

Q. Will you state whether, in June, 1902, or at any time in the summer of 1902, there was any conference or agreement, or conversation, between your two brothers, your father and yourself, concerning the disposition—division—of the ice claim if it should be collected—as to the disposition or division of the money, I mean, among the children and your father?

A. In 1902, did you say?

Q. Yes, June, 1902, or at any time in the summer of 1902.

A. Where; I don't think—

Q. Anywhere.

A. I don't think we were all together; I don't remember, no sir—

1902? Q. 1902. June, 1902?

A. Well, I don't remember.

Q. Well, do you remember any conversation between your brother Grand, your father and yourself, concerning the division that should be made between the children—that is, your father and his children—of the proceeds of the ice claim, when it should be collected?

A. Why, no. I supposed our father would do what was right by us. I do not remember any such, if any ever did take place.

Q. Then to the best of your recollection, you never saw any agreement signed by you, providing how the claim should be distributed.

A. I do not remember any such thing.

Q. To the best of your recollection, was there any?

A. I do not remember, I say. I do not remember whether there was any such thing.

Q. Well, was there any distinct understanding on your part as to what proportion of the proceeds of the claim you should have, if it were collected?

A. With who?

Q. Your father.

A. Why, no; never that I know of—I don't remember.

Q. The matter of division was left entirely to him?

A. As far as I know. I don't remember anything of the kind.

Q. Did you ever sign a contract—did you ever sign an agreement to which your father was a party, in which it was provided how the proceeds of the claim should be distributed?

A. I do not remember anything of an agreement.

Q. You don't remember ever signing one?

A. I don't remember any agreement.

Q. To the best of your recollection, did you ever sign one?

A. Well, I say I don't remember. I have no recollection at all of it.

Q. Then, the best of your recollection is that you did not; is that so?

A. I say I don't remember. No sir; I don't remember that I ever did.

158 Q. You feel very sure and certain of it?

A. I simply say I can't remember.

Q. I ask you, if you recognize your signature to that paper (handing paper to witness)?

A. It looks like my writing, but I don't have any recollection of it.

Q. That is your signature?

A. As near as I can tell.

Q. Joseph W. Parish. That is your father?

A. Yes sir.

Q. James H. Parish; that is your brother?

A. As near as I can tell.

Q. Emily E. Parish. That is yours?

A. Yes.

Q. And Grant Parish?

A. That is my brother. But I have no recollection—

Q. I am not asking that. I am merely asking you to identify your signature.

A. Yes sir.

Q. And that purports to be signed on the 12th of June, 1902?

A. I haven't any recollection—

Q. I am not asking that.

A. Yes sir. It is very strange; I can't remember how it happened.

Q. And you have no recollection of attaching your signature to any agreement in which it was provided how the money, if collected, should be divided among the children. You don't remember that?

A. No, sir; I do not.

Q. Do you remember signing any such paper or agreement in June, 1902, in which it was provided that after the payment of Mr. McGowan's fees, naming Mr. McGowan, the balance should be distributed in a certain way—you have no recollection of that?

A. No sir; none at all.

Mr. WILSON: That is all.

Redirect examination.

By Mr. ROBINSON:

Q. I just want to get you to identify one or two papers. I will ask you if that is your signature, Miss Parish, to that paper (handing paper to witness)?

A. Yes sir.

Mr. ROBINSON: I offer this in evidence. This is the original of a deed in fee, made September 16, 1896, and recorded September 16, 1896, in Liber 2157, folio 248, et seq., from Emily E. Parish to Grant Parish, conveying the eastern 18 feet of lot 12, square 761, Washington, D. C.

(The paper so offered in evidence was marked Defendants' Exhibit No. 5," and is attached hereto.)

By Mr. ROBINSON:

Q. Here is a paper which purports to be signed by Grant Parish and Emily E. Parish. That is the signature of your brother and yourself (handing paper to witness)?

A. (After examination.) Yes sir.

Mr. ROBINSON: I will offer this in evidence, and ask that it be marked by the stenographer.

159 (The paper so offered in evidence was marked "Defendants' Exhibit No. 6," and is as follows:)

"This agreement, made this sixteenth day of September, eighteen hundred and ninety-six, by and between Grant Parish, party of the first part, and Emily E. Parish, single, and sister of said party of the first part, both of Washington, D. C., Witnesseth:

That the said party of the first part—the grantee named in the certain deed made, executed and delivered to him by the said party of the second part, the grantor named therein, whereby she, the said Emily E. Parish, has sold and conveyed to her said brother, Grant Parish, his heirs and assigns forever, the certain real estate known and described upon the duly recorded plat of the said city of Washington, as the eastern eighteen (18) feet of original lot number twelve (12) by the full depth of said lot, in square numbered seven hundred and sixty-one (761), the same being the premises and property known as number 217 A Street southeast in the said city of Washington, District of Columbia, and heretofore and now being occupied as the residence and home of the said parties hereto.

Now, therefore, in consideration of the said conveyance on the part of said Emily E. Parish to her said brother and of advances and moneys paid out by him for her benefit upon the said property by way of repairs, and the payment of a trust given by her upon the same of six hundred dollars and upwards, the said Grant Parish promises and agrees that the said Emily E. Parish may remain and live in the said house and occupy the said premises as a home as she has heretofore done, during her natural life, or such other home, house or premises as she may at any time select in case of the sale of the said premises by said Grant Parish; and he further promises

and agrees that he will support and maintain his said sister in a good and respectable manner, such as her and his own standing in community demands.

"And the said Grant Parish agrees to furnish his said sister at all suitable times with money and means to make such purchases of food materials, raiment, fuel, and all things proper and necessary to keep and maintain, her own personal wants and needs, and the expenses, wants and needs of the said household as well. And she, the said Emily, agrees on her part to take personal care of the said home, to supervise its household affairs, to make the same an agreeable home for her said brother so long as he may desire to live there with her, or in such other house as he may hereafter provide as a home for her during her natural life, and with her consent.

In Witness Whereof, We hereunto set our hands and seals the day and year first above written.

GRANT PARISH. [SEAL.]
EMILY E. PARISH. [SEAL.]

Witness:

TENNEY ROSS.

160 DISTRICT OF COLUMBIA, ss:

Personally appeared before me on this sixteenth day of September, 1896, a Notary Public in and for said District of Columbia, Grant Parish and Emily E. Parish, personally known to me to be the identical persons who executed the foregoing instrument, and acknowledged the execution thereof, each for himself and herself for the purposes therein mentioned, and as the free act of each.

TENNEY ROSS,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed:) 19. Agreement. Office of the Recorder of Deeds. Washington, D. C. Grant Parish with Emily E. Parish. 11 14 a. m. Received for Record September 16, 1896, and recorded in Liber 2157 folio 250 et seq., one of the Land Records of the District of Columbia. Geo. F. Schayer, Dep. Recorder."

By Mr. ROBINSON:

Q. Now, then, here is a third one. This is a deed in fee, made March 11, 1908, and recorded the same day in Liber 2304, folio 127 et seq., from Grant Parish to Emily E. Parish, of the east 18 feet of said lot 12, square 761. Is the signature of Grant Parish to this paper the signature of your brother (handing paper to witness)?

A. (After examination.) Yes sir.

Mr. ROBINSON: I offer that in evidence.

(The paper so offered in evidence was marked "defendants' Exhibit No. 7," and is attached hereto.)

(Reading and signing of the foregoing deposition by the witness waived.)

E. L. WHITE,
Examiner in Chancery.

Mr. ROBINSON: Mr. Wilson, I would like you to identify Mr. McGowan's signature to this paper, if you will (handing paper to Mr. Wilson).

Mr. WILSON (after examination): I think that is Mr. McGowan's signature; yes.

Mr. ROBINSON: I offer this in evidence.

(The paper so offered in evidence was marked "Defendants' Exhibit No. 8," and is as follows:)

"J. H. McGowan, Attorney, Room 3, McGowan Building.

WASHINGTON, D. C., Aug. 6/96.

Mr. Grant Parish, City.

MY DEAR SIR: Yours of 5th Inst. enclosing your check for \$10. in pay't of my bill for services rendered Miss Parish, is duly received. Accept thanks.

You are quite correct in saying that my friendship for your sister enters largely into all I have attempted to do in her favor. It is a great gratification to me to think that she has a nice little home—now free of encumbrance, I believe, by reason your assistance.

With regards to her, I am,

Very truly yours,

J. H. MCGOWAN."

Mr. ROBINSON: I also offer in evidence certificate of the Washington Title Insurance Company, dated December 3, 1894, reciting a consideration of \$15 paid by J. H. McGowan, showing the title to lot 12, square 761, good in Emily E. Parish.

(The paper so offered in evidence was marked by the stenographer "Defendants' Exhibit No. 9.")

Mr. ROBINSON: I also desire to offer in evidence the transcript of record in the suit of John H. McDaniel and Lee Chalmers, Complainants, vs. Joseph W. Parish and James H. McGowan, Defendants, Equity No. 13,927, the transcript having been filed in the Court of Appeals, Case No. 257, September Term, 1893, and request that the following memorandum in reference thereto be made:

Mr. WILSON: I desire to note an objection.

(The memorandum so offered was marked by the stenographer, Defendants' "Exhibit No. 10," and is as follows:)

"The bill charges that on the 25th of October, 1887, the eastern 18 feet of lot 12, square 761, was conveyed to said McGowan for the consideration of \$6,500 and that the real estate so conveyed to McGowan was purchased for and paid out of money belonging to the defendant Parish, but the title taken in the name of said McGowan, in order to hinder and delay the creditors of said Parish. The bill prays for process against the defendants; for the appointment of a trustee to make sale of the premises to meet the claim of creditors, and that the deed to McGowan 'may be declared null and void, and the same cancelled.'

The answer of J. W. Parish denied any interest in the property, but stated, that his daughter had entered into an agreement to purchase the same from the defendant McGowan, and annexed to his answer the agreement with McGowan.

The answer of McGowan admits he purchased the property in pursuance of an oral agreement subsequently reduced to writing, that if he made the purchase, Emily E. Parish, the daughter of J. W. Parish, would purchase from him; and that subsequently the said Emily completed the purchase; "that respondent had no reason to believe then, and has no reason to believe now that the purchase was made by said Emily E. Parish for the benefit of said Joseph W. Parish, or that said Joseph W. Parish was the owner of the money paid to respondent by said Emily E. Parish."

"On the coming in of these answers, by leave of Court an amended petition was filed, making Emily E. Parish a party defendant. In this amended bill complainants aver and charge: 'That the defendant Emily E. Parish knew nothing touching the entire purchase of the property, except what was told her by the defendants McGowan and Parish; that she acted as she was told. The scheme was to make the purchase in the manner and through the means aforesaid emanated from the minds of the defendants Parish and McGowan.'"

162 To this amended bill, the defendant McGowan answered that the sum of \$18,500 was drawn upon U. S. Treasury draft No. 27366 by this respondent; that 'at different times he has collected money from the United States for the said Parish as his attorney,' but 'that none of the moneys so collected were paid over by said Parish to this respondent, other than such attorney fees as had been agreed upon between said Parish and this respondent.' The defendant Emily E. Parish also answered denying the allegations of the original and amended bills. The same counsel appeared for Joseph W. Parish, Jonas H. McGowan and Emily E. Parish, viz: T. H. N. McPherson, George C. Hazelton, Mason N. Richardson.

Testimony was taken on both sides, and Jonas H. McGowan, produced as a witness on behalf of the defendants, to the following questions made the responses noted in respect to a treasury draft for \$18,500, bearing date March 18, 1889, to the order of J. W. Parish & Co.

"Q. State if you drew the money upon that draft?"

A. Yes; I have no doubt I drew the money on that.

"Q. Can you tell what you did with it; did you pay it to Mr. Parish?"

A. I paid a portion of that to Mr. Parish.

"Q. Do you know how much?"

A. No, sir; I cannot tell how much. I judge it was out of that money that I paid this \$2,000. I had as I stated in my examination in chief, two matters, each aggregating about \$18,000. One was for some barges that were broken up during the war on the Mississippi River. That was a Treasury matter, and after it was allowed, it went to Congress, and an appropriation was made, which I had paid through the Treasury Department, very much as I did the other matter, which was an appropriation for an ice contract."

"Q. After paying that \$2,000 that you have mentioned, with interest out of the proceeds of that draft, how much of the residue of that draft did you give to Mr. Parish?

A. After taking my fee out, my recollection is, I paid the balance to him.

"Q. Now this case requires that I should ask you about your fee, otherwise I would not ask you that. Will you please tell me how much you took out for your fee?

"Mr. HAZELTON: That is objected to upon the ground that it is inquiring into a private contract of the witness and about professional business of his own.

"A. I think in justice to my client, I should decline to answer that question.

"Q. Do you decline to answer because you do not want to state the amount of money you paid to Mr. Parish, or because your fee was extraordinarily large?

A. Because it is a matter between client and attorney which should not be divulged.

"Q. Can you approximate the amount of money that you paid to Mr. Parish out of the proceeds of that draft, besides the \$2,000 and interest?

A. You ask me to do indirectly what I decline directly to do. If I should answer that question you could make your deduction." (Page 78 of McGowan's testimony.) On page 163 75, McGowan states; "Mr. Parish had a desk in my outer office."

Mr. ROBINSON: I will also put in evidence two earlier reports in this Parish claim, one of the 55th Congress and the other of the 56th Congress, and hand them to the examiner as exhibits.

(The papers so offered in evidence were marked Defendants' Exhibits Nos. 11 & 12, and are attached hereto.)

Mr. WILSON: It is agreed that my objection applies to all of these exhibits which you have put in evidence, Mr. Robinson, the same as though the objection had been severally noted to the papers as they were offered, as not being material or pertinent to any of the issues in this case.

Mr. ROBINSON: Yes.

Mr. DARLINGTON: Gentlemen, I have a few questions which I desire to ask Mr. McKee and Mr. Morey on cross examination.

Mr. CONRAD: We will have them here at the next session.

(Thereupon, at 5 o'clock, p. m., an adjournment was taken to May 16, 1910, at 3 o'clock, p. m.)

E. L. WHITE,
Examiner in Chancery.

WASHINGTON, D. C., May 16, 1910—

Monday, at 3 o'clock p. m.

Met, pursuant to adjournment, at the office of Holmes Conrad, Esq.

Present on behalf of the plaintiff McGowan, Mr. Nathaniel Wilson.

Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Whereupon ELLWOOD P. MOREY, a witness heretofore duly sworn, was recalled for cross-examination.

By Mr. DARLINGTON:

Q. Mr. Morey, referring to your letter to Mr. J. W. Parish of October 9, 1904, introduced in evidence in your examination in chief, will you kindly inform us what response if any, by way of a call at your office, telephone message, or of whatsoever other character, you received in answer to that letter from Mr. J. W. Parish?

A. There was no response of any character whatever.

Mr. DARLINGTON: That is all.

Mr. CONRAD: No questions.

(Thereupon, the meeting was adjourned until Tuesday, May 17, 1910, at 3:30 o'clock p. m.)

ELLWOOD P. MOREY,

By E. L. WHITE,

Examiner, by Consent.

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WASHINGTON, D. C., May 17, 1910—

Tuesday, at 3:30 o'clock p. m.

Met, pursuant to adjournment, at the office of Holmes Conrad, Esq.

Present on behalf of the plaintiff McGowan, Mr. Nathaniel Wilson.

Present on behalf of the plaintiff Brookshire, Mr. J. J. Darlington.

Present on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Whereupon THOMAS H. MCKEE, a witness previously sworn, was recalled and is examined.

By Mr. CONRAD:

Q. Mr. McKee, when you were on the stand before you were speaking of an interview which you had with Mr. McGowan. You said: "I asked Mr. McGowan what the status of the case was and who the attorneys were of record. As near as I remember—it is

five years ago—his answer was this: That he had prepared it and followed it up, to the time it was rejected in the Treasury Department, but he said, 'I don't care who collects it, I want my fee out of it'. That was about the substance of his answer."

I ask you now, if in that conversation Mr. McGowan made any remark to you, indicating what his purpose was as to the further prosecution of the case—whether he did or did not intend to prosecute it further.

A. My recollection is that that matter did come up in the conversation. About the only thing that I remember distinctly about it was the statement on his part that he did not care who continued the case. Now that was drawn out, as I remember it, in this way: I asked him if he had any objections to my going on with it, and my recollection is that he said he didn't care who collects it so I get my fee out of it. That was about the statement.

Q. He didn't say then that he did or did not intend to prosecute it further?

A. No. He gave me to understand that he had no objection to my getting into it, but he gave me to understand that he expected his fee. That is my recollection.

Mr. CONRAD: That is all.

Cross-examination.

By Mr. DARLINGTON:

Q. Do you recall, Mr. McKee, how the matter came up. Did it come up by your stating to him that you had been requested to prosecute the case?

A. I told him that I had been requested by Mr. Parish. He had left the papers in my hands, and I had them with me at the time.

Q. And this remark was in answer to that?

A. Yes sir, in answer to that question.

165 Q. This interview, as I gather from your deposition, was after the death of Mr. Parish?

A. Yes. Several days after.

Q. Had you, in the meantime, been asked by any one else to prosecute the case?

A. Mr. Parish, before he died, had left the papers with me, and immediately after his death—I don't remember whether it was the same evening or the following evening—his daughter sent for me and asked me to come to the house. At that time, she asked me to take the case and proceed with it, and I fully intended to look into it. I knew there was a power of attorney in existence by watching Mr. McGowan going back and forth to the Capitol while I was clerk there, and my first impression was to go to Mr. McGowan and find out from him the status of the case.

Q. Whether it would be agreeable for him to have you prosecute the case?

A. Yes.

Q. Will you kindly state, as fully as you can, what took place at the interview with Miss Parish on the occasion you mention?

A. Mister or Miss?

Q. Miss Parish.

A. It is pretty hard for me to recall. They were in mourning, of course, as it was immediately after his death, and the conversation for a long time that evening turned upon the life and character of Mr. Parish. It was a good while before we got to the question, and my recollection of it at this time is that there was not much said about it, only that I suggested to them at that time—and we attempted to carry that out afterwards—that we go to Judge Cole's office. I said if I went into it I would like to have Judge Cole retained, and would like to have them go with me and have a talk with Judge Cole. There was not very much said—nothing about terms, what per cent they were willing to give. Nor did Mr. Parish ever enter into that with me. The only thing he said was, "I want you to take the papers and take hold of this case, and I know that you can work it through, because of your relations with Congress, now that you are out." I think I said nothing to Miss Parish or to Grant, as I remember it, as to the terms or conditions, except that I wanted first to investigate who the attorneys were and the nature of the claim—I had had a good deal of experience with liens and powers of attorney, and knew what the effect of it was—but there was nothing definite as to conditions.

Q. Grant was present at the interview or conversation, then?

A. Yes; he and his sister. There was no one else in the room at the time.

Q. Do you recall the name of any attorneys being mentioned in that interview?

A. No, not unless it was Judge Cole. I mentioned Judge Cole.

Q. Were the former attorneys mentioned at all—Mr. McGowan and Mr. Brookshire?

A. Oh, I think so; I think I talked freely about them—I can't state whether I did at that time, but I talked freely to Mr. Parish and them both, about taking hold of it. I know when Mr. Parish first brought me the papers, I said to him that I wouldn't
166 take the case—I wouldn't think of taking it—without consulting Mr. McGowan and whoever has a power of attorney, and he said, "That is all right," of course he expected me to do that. But of course I can't give the conversation, as it is five or six years ago. The incident is about as much as I can remember.

Q. Do you recall that, either on the occasion of this interview with Miss Parish and her brother, or some subsequent interview, Mr. McGowan's connection with the case was referred to?

A. No, I do not think I could say positively that his name was mentioned. You see, I had but the one interview with the lady. That was at her home the evening, I think, after the funeral, and I can't say that Mr. McGowan's name was ever mentioned in the conversation at that time.

Q. Did you visit Judge Cole's office?

A. Yes.

Q. In company with whom?

A. My recollection is that Grant Parish and his sister and one other gentleman, whose name I don't remember.

Mr. CONRAD: Mr. Potbury?

The WITNESS: I think Grant and his sister, and a gentleman whom I did not know—a third party. I do not know who he was now, and I don't recall that I knew at that time. There was a third party, and he was in some way connected with them—not with me.

By Mr. DARLINGTON:

Q. And you did not succeed in seeing Judge Cole?

A. Judge Cole just walked into the room—he did not sit down; he had his hands full of papers—and said, "You will have to excuse me, and come again. I can't give you a minute's time now, to talk the matter over." He died a few days, or within a short time afterwards. About the third or fourth day following that interview, Grant Parish came to me and demanded the papers.

Mr. CONRAD: Grant Parish?

The WITNESS: Yes.

A. (Continuing:) And I said, "You can't get the papers unless your sister, who is the administrator, sends me a written request for them, telling me to deliver them to you," and she did. I think somewhere among my papers I have that request.

Mr. DARLINGTON: That is all I care to ask.

Mr. CONRAD: We have nothing to ask this witness.

THOS. H. MCKEE,
By E. L. WHITE, *Examiner*.

Mr. CONRAD: Counsel for the complainants in this case having inquired of counsel for the defendants whether they would object to giving the date of the contract between Miss Parish and Mr. Conrad, I think it just as well that I should produce the contract and offer it in evidence. I shall ask the examiner to make a copy of the contract in the record, and hand the original back to me.

(The paper so offered in evidence was marked "Defendants' Exhibit No. 13," and is as follows:)

167 "This memorandum of agreement made this first day of Novb. A. D., 1905, between Emily E. Parish of the City of Washington, District of Columbia, sole executrix of the will of Joseph W. Parish, deceased, duly appointed by the Supreme Court of the District of Columbia, April 7th, 1905, party of the first part, and Holmes Conrad, attorney at law, of the same place, party of the second part.

Witnesseth, that the party of the first part for and in consideration of the premises hereinafter named doth hereby employ, engage and retain the party of the second part and doth hereby fully empower, authorize and direct said party of the second part to demand from the United States the sum of money claimed to be due from said United States to the estate of Joseph W. Parish, for ice sold to the United States under a contract with the firm of Joseph W. Parish and Company, and referred to in the act of Congress approved February 17, 1903 (Private No. 469), which sum of money was ascertained by the Auditor for the War Department in a report dated August 11, 1903, to amount to \$181,358.95. Said party of the

second part is hereby authorized and empowered to employ such means as in his judgment may be proper, whether by petition to the Congress of the United States; application to the Secretary of the Treasury or otherwise, to recover such sum or sums of money, or any part thereof.

And for his professional services in this behalf, the party of the first part hereby agrees and binds herself to allow and to pay to the said Holmes Conrad, party of the second part, a sum of money equal in amount to one-third ($1/3$) of the gross amount recovered from the United States on account of said claim to be paid out of the amount so recovered immediately upon the receipt thereof; and the party of the second part agrees to employ his knowledge and skill in such measures as he may adopt and think best for the recovery of said claim.

Grant Parish, one of the heirs at law, hereby ratifies this contract by signing the same.

Should such party of the second part die at any time before the final determination by the Court to which the claim of the party of the first part has been submitted, as to the merits of said claim and the right of recovery thereof, then there shall be no right of the party of the second part or of his estate against the party of the first part for any services rendered by said party of the second part up to and prior to the date of his death.

Said party of the second part is not authorized or empowered to make any contract with any other party or parties whom he may think wise or best to employ to assist him other than such contract as the death of said party of the second part may revoke.

In testimony whereof we have hereunto set our hands and seals on the day and year first above written.

EMILY E. PARISH.	[SEAL.]
HOLMES CONRAD.	[SEAL.]
GRANT PARISH.	[SEAL.]

Signed, sealed and delivered in the presence of

_____.

At the request of Mr. Parish the said Holmes Conrad agrees that the above power is not to be construed as conferring on him any authority to create any liability whatever upon the Estate of J. W. Parish except what is therein expressly presented.

A contract in writing, dated 1st November 1905, between the parties hereto was duly executed by both parties and the original was in the possession of Holmes Conrad, but having disappeared from his office this contract is executed in lieu thereof."

Mr. ROBINSON: If counsel will consent, we would also like to have copied in the record the statement of the First and Final Account of Emily E. Parish, Executrix of the Estate of Joseph W. Parish, deceased, as printed in the transcript of record in the case before the Court of Appeals, October Term, 1909, Emily E. Parish, Appellant, vs. Henry C. Hedges, Case No. 2050.

Mr. DARLINGTON: We have no objection to that. It can be put in.

(The said statement of account is as follows:)

"First (and Final) Account of Emily E. Parish, Executrix.

19—

(Letters Issued April 7, 1905.)

This accountant charges herself with the following, to wit:

	Assets received.	Disbursements.
Amount collected from the United States Government on account of the Ice Claim of Joseph W. Parish, according to a decision of the Supreme Court of the United States, rendered on May 17th, 1909, in the case of the United States ex Rel. Emily E. Parish, deceased, vs. Franklin MacVeagh, Secretary of the United States Treasury, recovered in said cause...	\$181,358.95	
Wearing apparel and a small amount of personal property left by the testator of the value of \$25.00.....		25.00
	<hr/>	
	\$181,383.95	

She claims credit and allowance for the following disbursements, to wit:

	Vou's.	
169 Grant Parish, reimbursement for funeral expenses of the decedent and expenses incident to the funeral.....	1	\$608.50
Holmes Conrad, Attorney, one-third of amount recovered, being contingent fee, under contract filed herewith and receipted....	2	60,452.98
Parker Bridget & Co., note.....	3	88.77
El Arte Cigar Co., cigars.....	4	18.00
Joe Beardsley, men's furnishings..	5	33.35
F. V. Killian Laundry.....	6	40.36
Emily E. Parish, on contract filed, probated and passed upon by the Court	7	12,000.00
A. D. Weakley D. D. S., professional services	8	27.00
J. W. Hodges, M. D., open account and three notes.....	9	477.00
	<hr/>	
Amounts carried forward.....	\$181,383.95	\$73,745.96

Form No. 124.

	Vou's.	Assets received.	Disbursements.
Brought forward		\$181,383.95	\$73,745.96
Andrew J. Curtis, note, check and cash	10		320.00
Dominic Cristofani whose claim was probated and allowed for \$9,-660.75 was compromised under order of this Court of June 2, 1909, and settled in full for \$7,000.00	11		7,000.00
Heber J. May, whose claim consisted of a contract for 2% of the amount recovered which would have been more than \$3,600.00 was compromised by the Attorney for the estate for \$1,750.00; in full settlement. The contract released is filed herewith.....	12		1,750.00
Fee allowed Jesse E. Potbury, attorney by the Court in full for professional services rendered to decedent from 1902 up to the time of his death in 1904; representing the estate and the Executrix from December 26, 1904, up to the present time for 170 which is allowed a fee of \$3,000.00; and for professional services in representing each of the three beneficiaries, Grant Parish, Emily E. Parish and the Young Men's Christian Ass'n of the City of Washington, D. C., in this estate, and in all matters connected with the estate, and also to act as a retainer fee in representing said Executrix and Grant Parish, Emily E. Parish and the Young Men's Christian Ass'n in the suit of Jonas H. McGowan et al., vs. Emily E. Parish et al., now pending in the Supreme Court of the District of Columbia, and in any other suit or suits which may be filed against said Executrix or the legatees herein named the sum of \$3,000.00	13		6,000.00

Register of Wills, balance of costs including this a/c	14		46.00
Emily E. Parish, commission for responsibility and services rendered and to be rendered as Executrix administering and settling estate at 2% upon \$181,383.95..	22		3,627.68
1905, Mar. 28. The Washington Times, application for probate..	15		5.85
Amounts carried forward...		\$181,383.95	\$92,495.49
		Vou's. Assets received.	Disbursements.
Brought forward.....		\$181,383.95	\$92,495.49
1905, Dec. 16. The Washington Times, notice to creditors.....	16		4.50
March 3. The Washington Law Reporter, application.....	17		7.56
Dec. 22. The Washington Law Reporter, notice to creditors.....	18		5.00
Jan. 27. Probate Court costs \$15.00			
May 4. " " " " 4.31			
	19		19.31
H. H. Gilfry, promissory notes amounting to \$42,986, probated, which is compromised by the attorney for the estate for 50% of the claim, namely \$214.93	20		214.93
171 Amount deposited in the American Security and Trust Co. of Washington, D. C., in the case of Jonas H. McGowan and Elijah V. Brookshire vs. Emily E. Parish, Executrix of the estate of Joseph W. Parish, Equity #28561, now pending in the Supreme Court of the District of Columbia, according to a decree passed in said case on the 2d day of June, 1909, by Mr. Justice Barnard, and to be held by said bank according to the terms of said decree, a certified copy of which decree is herewith filed as a voucher for the deposit of said fund	21		41,000.00

The claim of H. F. Dutton & Co. Bankers, on promissory note dated April 18, 1885, for \$3,500, is outlawed, disputed and rejected and the reason for its being disputed and rejected is given in a brief of the law governing said claim filed by the attorney for the estate.

The statute of limitations is pleaded against all other claims, if any, not specifically mentioned, as publication against creditors was had according to Law on April 7th, 1905.

		\$133,746.79
Balance carried forward...	47,637.16
		<hr/>
		\$181,383.95
		\$181,383.95

Joseph H. Parish, son of the testator, died in Chicago, Ill., on January 10, 1908, leaving no children or descendants, his death being proven herein, and Grant Parish and Emily E. Parish his brother and sister survive him as his only heirs at law and next of kin.

Distributable in accordance with the provisions of the last will and testament of said Joseph W. Parish, deceased, as follows to wit:

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To Grant Parish, son, 1/3.....	\$15,879.05	
And 1/2 of 1/2 of 1/3, vou. 23.....	3,969.77	
	<hr/>	19,848.82
To Emily E. Parish, 1/3.....	\$15,879.05	
And 1/2 of 1/2 of 1/3, vou. 24.....	3,969.77	
	<hr/>	19,848.82
To the Young Men's Christian Association of the City of Washington, D. C., 1/2 of 1/3, vou. 25.....	7,939.52
	<hr/>	
	\$47,637.16	\$47,639.16

We, the undersigned, being all the heirs at law and next of kin of said Joseph W. Parish, deceased, and all the legatees under his last will and testament, approve the foregoing account of Emily E. Parish, Executrix.

Witness our hands and seals this 7th day of June, A. D. 1909.

EMILY E. PARISH.

[SEAL.]

GRANT PARISH.

[SEAL.]

YOUNG MEN'S CHRISTIAN ASS'N OF
WASHINGTON, D. C.,

By J. E. POTBURY, Att'y."

No. 12677. Administration.

In re ESTATE OF JOSEPH W. PARISH, Deceased.

DISTRICT OF COLUMBIA, ss:

I, Emily E. Parish, Executrix of the above named estate, being first duly sworn on oath depose and say that since the approval of my first and final account in the above estate as executrix thereof wherein a fee of \$6,000 is allowed to Jesse E. Potbury attorney for services rendered and to be rendered the estate; a new arrangement has been made between this affiant and the said attorney whereby the allowance made is to be reduced by the deduction of any allowance by way of retainer for representing said estate or the executrix thereof or Grant Parish in any suits now pending, and especially in the McGowan et al. vs. Parish, Executrix case, Equity No. 28561, and any suit or suits which may be filed against the said executrix or either the said Emily E. Parish or Grant Parish under which arrangement the allowance to be made said attorney shall be \$3,000; the difference between said allowance and the allowance allowed by the court of \$6,000 to be distributed among the legatees in accordance with the provisions of the last will and testament of Joseph W. Parish, deceased, as follows:

To Grant Parish \$1,250; to Emily E. Parish \$1,250 and to the Young Men's Christian Association of the City of Washington, D. C., the sum of \$500.

EMILY E. PARISH,
Executrix Estate of Joseph W. Parish, Deceased.

173 Subscribed and sworn to before me this 18th day of June,
A. D. 1909.

[NOTARIAL SEAL.]

MARY R. FARLEY,
Notary Public, D. C.

I approve of this and agree to the same, and acknowledge receipt of payment of said \$3,000 as being made by the executrix of said estate, which sum of \$3,000 when made shall be in full payment of all my demands for services rendered by me for said estate and for said parties.

JESSE E. POTBURY, *Attorney.*

Witness:

HOLMES CONRAD.

WASHINGTON, D. C., June 8th, 1909.

Received of Emily E. Parish, Executrix estate of Joseph W. Parish, deceased, the sum of \$8,439.52, same being in full satisfaction and settlement of the legacy of the Young Men's Christian Association of the City of Washington, D. C., under the will of Joseph W. Parish, deceased, as per account stated and passed by the Court on June 7th, 1909, and also in accordance with the supplemental account filed June 8th, 1909, making the sum of \$7,939.52 and \$500.00 aggregating the full amount of \$8,439.52.

I execute this release in accordance with the resolution of the Board of Directors of the Young Men's Christian Association of the City of Washington, D. C., certified copy of which is attached hereto.

JESSE E. POTBURY,
*Attorney for the Young Men's Christian Association
of the City of Washington, D. C.*

Mr. CONRAD: My inclination is not to put any more witnesses on the stand at the present time, but to let you put in your testimony in rebuttal. Then, after that, we may want to call some witnesses in surrebuttal. We will not close our testimony in chief at this time, however because we want to look over the record before finally determining whether to call any further witnesses and we shall let you hear from us in a few days.

Thereupon, at 4 o'clock p. m., the taking of testimony in the above entitled cause was adjourned until further notice.

E. L. WHITE,
Examiner in Chancery.

WASHINGTON, D. C., November 7, 1910—

Monday, 3 o'clock p. m.

Met, pursuant to agreement, at the office of Nathaniel Wilson, Esq., in the Pacific Building.

174 Present, on behalf of the plaintiffs, Messrs. Nathaniel Wilson and J. J. Darlington.

Present, on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Present, also, the plaintiffs Elwood P. Morey and Elijah V. Brookshire, and his Examiner.

Mr. Conrad, on behalf of the defendants announced the taking of defendants' testimony closed.

Thereupon, the further proceedings in the above entitled matter were adjourned, subject to notice.

E. L. WHITE,
Examiner in Chancery.

Plaintiffs' Testimony in Rebuttal.

WASHINGTON, D. C., November 14, 1910—

Monday, 3 o'clock p. m.

Met pursuant to agreement, at the office of Nathaniel Wilson, Esq., in the Pacific Building.

Present, on behalf of the plaintiffs, Messrs. Nathaniel Wilson and J. J. Darlington.

Present, on behalf of the defendant Emily E. Parish, Messrs. Holmes Conrad and Leigh Robinson.

Present, also, the plaintiffs Elwood P. Morey and Elijah V. Brookshire, and the Examiner.

Whereupon ELIJAH V. BROOKSHIRE, having been heretofore duly sworn, was recalled as a witness in rebuttal and is examined—

By Mr. DARLINGTON:

Q. Mr. Brookshire, you were present at the examination of Miss Emily Parish in this case?

A. Yes.

Q. You remember the letter identified by her in the handwriting of Grant Parish, asking you to call at the house "at 3 o'clock p. m., Friday, not before that hour"?

A. Yes sir.

Q. And on which there was a pencil memorandum dated October 17, 1902?

A. Yes sir.

Q. Who made the pencil memorandum thereon?

A. I did.

Mr. CONRAD: Defendant-, by counsel, excepts to any examination at all as to any paper signed by Grant Parish, or any written or oral communication had between the complainants or any one of them and Grant Parish.

By Mr. DARLINGTON:

Q. Please state whether you called at the house of Mr. Parish in response to that letter?

A. I did.

Q. Whom did you see there?

A. I saw Mr. Grant Parish and Miss Emily Parish.

Q. State whether any discussion, and if so what, took place at that time between you and Miss Parish and her brother, in
175 her presence, in regard to the compensation you were to receive in connection with this ice claim.

A. Yes. The question of our compensation, that is, Mr. McGowan's and my compensation, was discussed at that time and I told Mr. Grant Parish and Miss Emily Parish that I thought our compensation should be equal to not less than 25 per cent of the amount recovered.

Mr. ROBINSON: One other objection to all the testimony pertaining to the testimony of this witness: This is testimony in chief and not in rebuttal, and counsel object to it on the ground that it is not proper testimony in rebuttal, but should have been taken in chief, and when our client was here.

By Mr. DARLINGTON:

Q. What was said by Mr. Grant Parish in the presence of Miss Emily Parish, or by Miss Emily Parish on that matter?

A. Grant Parish said that that would be fair; that is, Grant Parish said he thought 25 per cent would be a fair compensation. I do not think Miss Emily Parish expressed any opinion about it.

Q. Do you also recall a letter or note of Grant Parish, appearing at page 280 of the record, identified by Miss Parish as in her brother's handwriting, and with a pencil memorandum—"June 22, 1903, 4:30 o'clock p. m." Do you recall that paper?

A. Yes sir.

Q. Who made that pencil memorandum?

A. I did.

Q. Please state whether, on that occasion, you called on Miss Parish and her brother?

A. I called at the house of Miss Emily Parish on the succeeding day, that is, on the 18th—no, I called on the same day, the 22nd, in response to that letter.

Q. And what, if anything, was said to her, in her presence or by her, on that day in connection with this ice claim and the compensation of yourself therein?

A. This letter came to me on the 22nd and I went that day to the house in response to the letter. Mr. Grant Parish and Miss Emily Parish desired to know why Mr. McGowan, Mr. Morey and myself were not able to get the case along more rapidly in the Auditor's office. The case had then been pending for about three months in the office of the Auditor for the War Department, and they wanted to know why we could not get the case along more rapidly.

Q. What explanation did you make?

A. I told them that we, Mr. McGowan, Mr. Morey and myself, were doing the best we could to get the case speedily considered and I could not think of anything else we could do, other than what we had done already.

Mr. CONRAD: It is understood that the two exceptions noted heretofore apply to all the examination throughout?

Mr. DARLINGTON: Oh, yes.

I now offer in evidence a memorandum taken from the records of the Probate Court in Re Estate of Joseph W. Parish, No. 12,677, Administration, with reference to the appearance of Cole & Donaldson. This paper goes in subject to examination by counsel on either side, and correction if they find any inaccuracies in it.

176 (The paper so offered in evidence was marked by the Examiner "Plaintiffs' Exhibit No. 24.")

Mr. CONRAD: In order to exclude any conclusions, I will note on the record that on Complainants' Exhibit M. & B. No. 1, the contract of the 20th of January, 1903, between Parish and Brookshire, the word "hereafter," written in the typewritten original, is admitted to be in the handwriting of Mr. Brookshire.

I have no cross-examination.

Subscribed and sworn to before me this — day of —, 1910.

ELIJAH V. BROOKSHIRE,
By E. L. WHITE, *Examiner*.

Mr. WILSON: In accordance with the notice filed on the 30th of March, reserving the right to introduce the papers that are there specified, I offer in evidence the following papers:

A. Copy of power of attorney given by Joseph W. Parish to Mr. McGowan, dated the 25th of March, 1903, taken from the files of the Treasury Department.

B. Copy of the assignment filed in the Treasury Department on the 20th of March, 1903, signed by Mr. McGowan.

C. Next, Form 368, Certificate 23729, entitled "copy of Certificate of Settlement of Claim 143,880, and dated August 11, 1903. And with that, what purports to be a copy of computation bearing date April 28, 1903.

D. Finally, a copy of the will of Joseph H. McGowan, as filed for probate and duly probated in the Orphans' Court of the District of Columbia.

(The papers so offered in evidence, were marked by the Examiner "Complainants' Exhibit No. 25, A, B, C, and D, consisting of fifteen sheets.)

Mr. CONRAD: We are not disposed to file any exceptions to these papers now, and on behalf of the defendant, it is agreed that the papers now offered may be filed subject to exceptions hereafter to be made by defendants if, upon examination, exception appears to be necessary.

Mr. DARLINGTON: Exception to be made before the testimony is closed.

Mr. ROBINSON: Yes.

Mr. CONRAD: Miss Parish being away from the city, it is agreed that the Examiner may sign her name to her deposition.

Thereupon, at 3:45 o'clock p. m., the session was adjourned.

E. L. WHITE,
Examiner in Chancery.

Testimony for complainant- and defendants closed.

E. L. WHITE, *Examiner*

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PLAINTIFFS' EXHIBIT No. 8.

House of Representatives, 57th Congress, 1st Session.

Report No. 2104.

Joseph W. Parish.

May 19, 1902.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Graff, from the Committee on Claims, submitted the following report:

[To accompany S. 475.]

The Committee on Claims, having considered Senate bill 475, recommended that the bill do pass without amendment. The facts are fully set forth in Senate Report No. 351, Fifty-seventh Congress, first session, as follows:

The Committee on Claims, to whom was referred the bill (S. 475) to refer the claim of Joseph W. Parish to the Secretary of the Treas-

ury for examination and payment of any balance found due, having had the same under consideration, beg leave to make the following report and recommend the passage of the bill:

This claim has received several favorable reports in the House of Representatives, and was favorably reported to the Senate by the Committee on Claims during the Fifty-sixth Congress (Report No. 1628), which report fully set forth the facts in the case, and is hereby adopted as the report of your committee.

The report referred to is as follows:

On the 5th day of March, 1863, Mr. Parish, in company with one William L. Huse, under the firm name of J. W. Parish & Co., contracted with the United States to "deliver at Memphis, Tenn., Nashville, Tenn., St. Louis, Mo., and Cairo, Ill., the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This ice was intended for use in the hospitals and in the field for the sick and wounded soldiers of the Army.

The price to be paid for the ice, as the same should be delivered at these various points, was stipulated in the contract, and the quantity left to be determined by the Government.

The matter of quantity was quickly settled by the Assistant Surgeon-General in an order to the contractors, under date of March 25, 1863, fixing it at 30,000 tons. This order also directed 20,000 tons of the ice to be delivered at Nashville and Memphis "without delay." Thus in twenty days from its date the contract became definite and determined as to amount, price, places, and time of delivery.

Very soon after this contract was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish.

The contractor at once commenced the purchase of ice, and 178 within a week had succeeded in securing sufficient to fill the entire contract. Large portions of this were purchased at Ogdensburg and Kingston, on the St. Lawrence River, and at Lake Pekin, in Minnesota—long distances from places of delivery.

After such purchases were all made and the contractor stood ready to fulfill his contract he was notified by the said Assistant Surgeon-General that the Surgeon-General of the Army had directed that the order above referred to should be suspended "until further instructions." This suspension was never wholly removed. From that time to the close of the year 1863 (the date of termination of the contract) the contractor was called upon by the proper medical officers to deliver only about 12,670 tons of ice, although it appears he was during all the time ready and desirous to deliver the full amount of 30,000 tons, as the Assistant Surgeon-General had directed, and frequently tendered the same.

Parish could not dispose of the ice he had purchased on the requisition of the Assistant Surgeon-General, because the order to purchase 30,000 tons was only "suspended" and he might be called upon at any moment to complete his contract, and if the ice had been disposed of it would have been impossible to obtain an additional

supply. The contract terminated and the balance of the ice melted away and was a total loss.

The claimant first applied to the executive department of the Government for relief. After the delays incident to the prosecution of a claim before the departments, and utterly failing in his efforts in that direction, he applied to Congress.

On May 30, 1872, an act was approved which authorized the Court of Claims to hear and determine his claim. A large amount of testimony was taken at great expense and the case finally brought to a hearing. The court entered a decree dismissing the petition on the ground that Assistant Surgeon-General Wood had no authority to determine the quantity of ice that would be required, and that his action therein was wholly nugatory.

From this decree an appeal was taken to the Supreme Court. The decision below was reversed, the Supreme Court holding that the acts of the Assistant Surgeon-General were the acts of the Surgeon-General and bound the Government.

The facts in the case were found by the Court of Claims. They are reported in 12 Court of Claims Reports, 609-617. The ninth finding reads as follows:

"IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

The Supreme Court entirely overlooked this finding, declaring that the claimant did not offer to deliver the ice. The result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties. That there may be no misapprehension on this point we quote from the opinion of the court delivered by Justice Miller (10 Otto, 500):

179 "If claimants intend to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price of all those amounts, they should have delivered, or tendered, or offered to deliver, and demanded payment.

"If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or, rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

"In point of fact, the order was never revoked, but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require,

accept, and pay for part of it. The balance was never delivered or tendered.

"Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they can not recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it, then the court admits that his measure of damages would have been "the contract price of the ice or the profits he might have made if he had done so."

But on the false assumption that no delivery was tendered, the court laid down the rule that the claimants were only "entitled to recover what they paid for the ice that was lost and what expense they were at in making the purchase and in keeping it until it was lost."

In the case of the *United States v. Behan* (110 U. S., 338), which was decided four years later than the Parish case, and which is now the rule, the court laid down the rule as follows:

"The prima facie measure of damages for the breach of contract is the amount of loss which the injured party has sustained thereby. If the breach consist in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he had already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of *Masterton v. Brooklyn* (7 Hill, 69), they are the direct and immediate fruits of the contract, they are free from this objection; they are then 'part and parcel' of the contract itself, entering into and constituting a portion of its very elements; something stipulated for the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense." (Also see *United States v. Speed et al.*, 8 Wall., 77.)

In the *Masterton v. Brooklyn* case, cited by the Supreme Court in the above quotation, the plaintiffs contracted with the corporation of Brooklyn to furnish all the marble necessary for the erection of a certain public building. After part performance defendants refused

to complete the contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay.

The reasons for the application of this more equitable rule in the Behan case were not nearly so clear and strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in Behan v. United States.

In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the Parish case. At all events, there is no doubt that law is properly stated in the Behan case. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our Republic, and is recognized everywhere as the only equitable one that can be applied in the premises.

The propositions contained in the bill which we here report were embraced in a House bill in the last Congress and favorably reported. In that report the committee state that "the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court in United States v. Behan.

The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts. It is the opinion of your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

If the United States still owes the claimant, this fact will be disclosed and he will be paid. If it does not owe him, that will also be brought to light, and in either event a final determination be reached.

Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimants as this bill and the law contemplates.

Asst. Q. M. Gen. Robert Allen, who had charge of the Department of the Mississippi Valley during the civil war, with headquarters at St. Louis, Mo., and Louisville, Ky., in an official letter to Secretary of War Hon. W. W. Belknap, in March, 1873, said:

WASHINGTON, D. C., March 10, 1873.

DEAR SIR: The bearer of this, J. W. Parish, is a gentleman with whom I am well acquainted and can vouch for his integrity and trustworthiness in any condition of life.

Very truly,

ROBT. ALLEN,

*Brevet Major-General and Assistant
Quartermaster-General, U. S. A.*

Hon. W. W. Belknap, Secretary of War.

General Allen, in another letter to the Secretary of War in 1873, commending the patriotic spirit of J. W. Parish & Co. and others that came under his notice, said:

"For such as came to the front in the dark hours of the Government's peril, with their money and credit, as did J. W. Parish & Co., Pomroy & Benton, Child, Pratt & Fox, of St. Louis; Solomon Sturgess & Sons, of Chicago, with other firms, ought now to be met by the Government with a liberal spirit, for they proved themselves true and patriotic citizens of the Republic, and their efforts were greatly appreciated at that time by Government officials at St. Louis and Washington, and of course were valuable to the regiments in the field, and surely deserve the best attention of Congress and the Executive Departments, for it is a well-known fact that in the beginning of the war their acts started many a regiment to the front, and at a time the Government was in a helpless condition, without money or credit."

Hon. C. A. Dana, Assistant Secretary of War, in an official report to Secretary Stanton, dated January 27, 1864, says that—

"Parish & Co. faithfully executed their contract for ice last year at considerable loss."

Bills for the relief of Mr. Parish were introduced in the Fiftieth Congress and each succeeding Congress. Some of these have proposed to remedy the alleged injustice by allowing interest, 182 while others have provided for a direct appropriation. On at least five of these there have been favorable reports.

Your committee therefore recommended the passage of this bill, which will safeguard the interests of the Government and do justice to the claimant.

The following is made a part of the report:

In the Matter of the Claim of JOSEPH W. PARISH v. THE UNITED STATES.

Mr. Joseph W. Parish asks the Congress in S. 475 to let the facts of his claim, as disclosed by the evidence heretofore taken, go to the accounting division of the Treasury Department for an investigation and decision according to the rule of damages laid down by the Supreme Court of the United States in the case of the United States v. Behan (110 United States, 338).

It may therefore be interesting to know when said rule was laid down in the United States, and under what circumstances, and in what class of cases.

This rule was announced with much clearness and force in 1845 in the case of Masterton & Smith v. The Mayor of Brooklyn (7 Hill, 61), and this is the case quoted by the Supreme Court of the United States in the Behan case, *supra*. Masterton & Smith contracted to deliver 88,819 feet of marble to be used in the construction of the

city hall of Brooklyn, and had delivered 14,779 feet, for which they had been paid the contract price, when the defendant suspended work and refused any more marble. The plaintiffs had on hand at the quarry at the time the defendant suspended further delivery 3,308 feet prepared for delivery. And, to use the language of the court, "The contest arose out of the claim for damages in respect to the remainder of the marble, which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part and the case assumes that they were possessed of sufficient means and ability to have done so."

In the American and English Encyclopedia of Law (2d edition), volume 8, page 622, we find the law of damages announced in the case of the United States v. Behan (110 U. S., 308) laid down as follows:

"Where profits are the very object of the contract: In many cases profits are the very object and inducement of the contract, and so understood by both parties, and then, therefore, they are not only recoverable, but constitute the true and exclusive measure of damages to the extent to which they may be ascertained."

In a note to the above section we find cases cited in the following States, where the above rule is laid down: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New York, North Carolina, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Wisconsin. (Strauss v. Meertif, 64 Ala., 299, 307; Shoemaker v. Acker, 116 Cal., 239; Fell v. Newberry, 106 Mich., 542; Southerland on Damages (2d ed.), section 80).

In Williams v. Triplett (3 Iowa, 518, 531) the court said:

"On the day appointed he had the brick ready to deliver and so informed the plaintiff, who refused to receive them * * * It was then not necessary for him to tender or deliver the brick. It is well settled that a tender or delivery may be dispensed with by the positive acts or declarations of the payee."

In Franklin v. Krum (70 Illinois App., 649, 652), which was a suit occasioned by the refusal to receive 900,000 feet of lumber, the court said:

"Apparently from the course of the trial, it seems that the appellant's contention was that from the making of the contract to the refusal of the appellant to carry out the same it was obligatory upon the appellees to have all the lumber on hand ready for delivery. Such is not the law. It was sufficient for the purposes of the contract if appellees had and were ready to deliver the lumber whenever appellant wished for it. Nor is the averment in the plaintiff's declaration, that from the execution of the contract, March 3, 1893, to the 1st day of November, 1893, they had been ready and willing to deliver all of the lumber, compel appellees to prove that during this period they had in their possession all of such lumber. Nor were appellees, as is insisted, obliged to show that they tendered the appellant the lumber described in the contract."

In *Nelson v. Elevating Company*, (55 N. Y., 480) it was said by Judge Allen:

"An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented, or expressly waived, by the party to whom performance is due."

The above quotation is approved by the Supreme Court of the State of New York in the case of *Duryea v. Bonnell* (45 N. Y., Supp., 435), and the court, after approving the rule, laid down in *Nelson v. The Elevating Company*, supra, said:

"No tender was necessary, as the failure to deliver was produced by the defendant's refusal to receive," etc.

The *Duryea* case was an action by *Duryea* against *Bonnell* for refusal of defendant to receive a quantity of flour. The referee found that when defendant requested a quantity of flour from plaintiff, plaintiff would order the flour shipped from a mill direct to defendant, and that plaintiff owned no flour except as he purchased the same from the mill to fill orders. The court in passing on this case said:

"At the time when defendant should have taken the flour the firm was able and ready to deliver it. That it was not then delivered was the fault of the defendant. As he prevented the delivery in accordance with the terms of the contract we think it a salutary rule which holds him estopped from asserting that the firm did not go through all the technical forms of law in order to put him in default. In

order to permit the defendant now to assert that the firm was
184 not ready to perform, when his own act prevented it, would permit his own breach of contract to constitute a defense, and he would advantage by his own wrong."

In support of the above see *Ogden v. Marshall* (8 N. Y., 340); *Lawrence v. Miller* (86 N. Y., 131); *Eddy v. Davis* (116 N. Y., 247); *Hunter v. Wetsell* (84 N. Y., 549).

It is laid down by *Benjamin on Sales*, that where there has been a breach of an executory contract of sale "if the postponement has taken place at the buyer's request he is estopped from denying that the seller was ready and willing to deliver within the contract time." (*Benjamin on Sales*, 6 ed., p. 664.)

The above doctrine, announced by Mr. Benjamin, has been followed by numerous courts in the United States, and among others the supreme court of the State of New York, as will be seen by examining the case of *Duryea v. Bonnell*, supra; and this doctrine is also laid down by the courts of England with approval. (*Hockman v. Haynes*, L. R., 10 C. P., 598; *Ogle v. Earl Vane*, L. R., 3 Q. B. 272.)

"It is not necessary, in order to maintain an action on the contract, to show actual tender; readiness and willingness is enough." (*Tiffany on Sales*, p. 179.)

In *Kingsland, etc., Manufacturing Company v. St. Louis, etc., Company* (29 Mo. App. 527) the court said:

"The law is that a tender is not necessary where the party to whom it would be made has previously notified the party by whom it would

be made that the tender would not be accepted (*McKnight v. Wilkins*, 6 Mo. App., 118); or the person to whom it might be made has placed himself in such a position as to make it clearly appear that if made it would be refused."

In the syllabus of said case we find this language:

"The duty of offering to the defendant the article contracted for is dispensed with when the plaintiff has informed the defendant of their readiness for delivery, and asked for instructions, which the defendant refuses to give, or when the defendant has placed himself in a position from which it clearly appears that the offer would be refused."

In *Scribner v. Schenkel* (128 Cal., 250) the court, in substance, said: Where defendant received part of the hogs and paid for them, and declined to pay for more of them, there was a breach of the contract, and the plaintiff could enforce the contract without further delivery or offer of delivery, and the measure of damages is the difference between the contract price and the market price.

In the case of *Dustan v. McAndrew* (44 N. Y., 72, 78), the court said:

"A vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three modes to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such sale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

The case of *Hayden v. Demets* (53d N. Y., 426, 429) was a suit to obtain the contract price for 50,000 pounds of copper. The court said:

"The goods were ponderous and bulky, and in such a case a manual delivery is unnecessary. It is enough if they are placed in the power of the vendee. * * * He had the copper and offered it to the defendants. The law requires good faith and such acts only as are practicable, and according to the thing tendered and the nature of the business."

The cases here cited, as well as all similar cases, applying the rule of damages announced in the *Behan* case, are cases in most instances, if not all, where the vendor has gone to expense and trouble to possess himself of the merchandise or goods necessary to meet his contract with the vendee. It may be that the vendor at expense and trouble has prepared to deliver marble from a quarry, or he may have bought machinery and raw materials and begun to manufacture goods to be delivered in fulfillment of his contract.

The reason for the rule of damages in question is therefore apparent. A less exacting rule would in many cases permit the vendee to take advantage of his own wrong to the very great injury of the vendor, who at much expense and trouble had prepared to comply with the terms of the contract.

Another reason for the rule, heretofore stated, is that such contracts as we now contemplate have for their very object the obtaining of profits, and this is well understood when the parties execute the same. And for this reason profits are recoverable because they constitute the true and exclusive measure of damages when ascertained.

The rule of damages which could have been invoked by the Government, provided Mr. Parish had not lived up to the terms of his contract, is one fraught with peculiar danger to one taking a contract like the one entered into by Mr. Parish.

If the Government had revoked the order suspending the delivery of the ice, and had again ordered the delivery of the same, what would have been the rule of damages in a suit on behalf of the United States against Mr. Parish, provided he had failed to deliver the ice? The following is undoubtedly the rule:

"In a contract for the sale of goods the measure of damages for failure to deliver is the difference between the contract price and the value of the article in the market at the time and place of delivery." (Rahm v. Deig, 121 Ind., 283, 287; Loescher v. Deisterberg, 26 Ill. App., 520; Faulkner v. Closter, 79 Iowa, 15; Messmer v. Lead Co., 40 N. Y., 422, 427.)

The Iowa case of Faulkner v. Closter was occasioned by the failure to deliver at Kirkman a carload of potatoes, 400 bushels, and the court in stating the rule of damages said:

"There seems to be no dispute as to the rule of damages in such cases—that is, that the difference between the contract and market price at the point of delivery is the true rule," etc.

In the New York case of Messmer v. Lead Company, and the Indiana case of Rahm v. Deig, the courts lay down the rule as follows:

Where a person sells a merchantable article to another and fails to deliver, "the general rule is that the purchaser is entitled to recover the difference between the contract price and the value of the article in the market at the time and place of delivery."

Conclusion.

In the light of the undisputed facts of Mr. Parish's case, and the measure of damages clearly applicable to the same, it is apparent, we think, that the decision of the Supreme Court in Parish v. The United States (100 U. S., 500) is erroneous.

In an appeal from the Court of Claims to the Supreme Court of the United States only such statement of facts can be brought to the Supreme Court as may be necessary to enable it to decide upon the propositions of law ruled on by the Court of Claims, and that must be presented in the shape of facts found by the court and not by the evidence in detail. (De Groot v. The United States, 5 Wall., 419.)

The error of the Supreme Court was due, we think, to altogether overlooking the ninth finding of fact of the Court of Claims in Mr. Parish's case. In fact, we can not reconcile the decision of the Supreme Court with any other opinion. The ninth finding of fact is as follows:

"IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

In the case of Parish v. The United States, *supra*, the court said:

"If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price for all those amounts, they should have delivered or tendered or offered to deliver, and demanded payment. * * * Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages," etc.

Your committee, therefore, without further comment, are clearly of the opinion that the rule of damages announced in *Masterton and Smith v. The Mayor of Brooklyn* (7 Hill, 61, 69), followed and approved in the *Behan* case, *supra*, is the true measure of damages clearly applicable to claimant's case.

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PLAINTIFF'S EXHIBIT No. 9.

Calendar No., 377.

57th Congress, 1st Session.

Senate.

Report No. 351.

JOSEPH W. PARISH.

February 5, 1902.—Ordered to be Printed.

Mr. Mason, from the Committee on Claims, submitted the following:

Report.

[To Accompany S. 475.]

The Committee on Claims, to whom was referred the bill (S. 475) to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due, having had the same under consideration beg leave to make the following report and recommend the passage of the bill:

This claim has received several favorable reports in the House of Representatives, and was favorably reported to the Senate by the Committee on Claims during the Fifty-sixth Congress (Report No. 1628), which report fully sets forth the facts in the case, and is hereby adopted as the report of your committee.

The report referred to is as follows:

On the 5th day of March, 1863, Mr. Parish, in company with one William L. Huse, under the firm name of J. W. Parish & Co., contracted with the United States to "deliver at Memphis, Tenn., Nashville, Tenn., St. Louis, Mo., and Cairo, Ill., the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This ice was intended for use in the hospitals and in the field for the sick and wounded soldiers of the Army.

The price to be paid for the ice, as the same should be delivered at these various points, was stipulated in the contract, and the quantity left to be determined by the Government.

The matter of quantity was quickly settled by the assistant surgeon-general in an order to the contractors, under date of March 25, 1863, fixing it at 30,000 tons. This order also directed 20,000 tons of the ice to be delivered at Nashville and Memphis "without delay." Thus in twenty ways from its date the contract became definite and determined as to amount, price, places, and time of delivery.

Very soon after this contract was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish.

188 The contractor at once commenced the purchase of ice, and within a week had succeeded in securing sufficient to fill the entire contract. Large portions of this were purchased at Ogdensburg and Kingston, on the St. Lawrence River, and at Lake Pepin, in Minnesota—long distances from places of delivery.

After such purchases were all made and the contractor stood ready to fulfill his contract he was notified by the said Assistant Surgeon-General that the Surgeon-General of the Army had directed that the order above referred to should be suspended "until further instructions." This suspension was never wholly removed. From that time to the close of the year 1863 (the date of termination of the contract) the contractor was called upon by the proper medical officers to deliver only about 12,670 tons of ice, although it appears he was during all the time ready and desirous to deliver the full amount of 30,000 tons, as the Assistant Surgeon-General had directed, and frequently tendered the same.

Parish could not dispose of the ice he had purchased on the requisition of the Assistant Surgeon-General, because the order to purchase 30,000 tons was only "suspended" and he might be called upon at any moment to complete his contract, and if the ice had been disposed of it would have been impossible to obtain an additional supply. The contract terminated and the balance of the ice melted away and was a total loss.

The claimant first applied to the executive department of the Government for relief. After the delays incident to the prosecution of a claim before the departments, and utterly failing in his efforts in that direction, he applied to Congress.

On May 30, 1872, an act was approved which authorized the Court of Claims to hear and determine his claim. A large amount of testimony was taken at great expense and the case finally brought to a

hearing. The court entered a decree dismissing the petition on the ground that Assistant Surgeon-General Wood had no authority to determine the quantity of ice that would be required, and that his action therein was wholly nugatory.

From this decree an appeal was taken to the Supreme Court. The decision below was reversed, the Supreme Court holding that the acts of the Assistant Surgeon-General were the acts of the Surgeon-General and bound the Government.

The facts in the case were found by the Court of Claims. They are reported in 12 Court of Claims Reports, 609-617. The ninth finding reads as follows:

"IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

The Supreme Court entirely overlooked this finding, declaring that the claimant did not offer to deliver the ice. The result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties. That
189 there may be no misapprehension on this point we quote from the opinion of the court delivered by Justice Miller (10 Otto, 500):

"If claimants intend to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price of all those amounts they should have delivered, or tendered, or offered to deliver, and demand payment.

"If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

"In point of fact, the order was never revoked, but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require, accept, and pay for part of it. The balance was never delivered or tendered.

"Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they can not recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it

while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it, then the court admits that his measure of damages would have been "the contract price of the ice or the profits he might have made if he had done so."

But on the false assumption that no delivery was tendered, the court laid down the rule that the claimants were only "entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

In the case of the *United States v. Behan* (110 U. S., 338), which was decided four years later than the *Parish* case, and which is now the rule, the court laid down the rule as follows:

"The prima facie measure of damages for the breach of contract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without fault of the other party, who is willing to perform, 190 the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly the profits that he would realize by performing the whole contract. The second item—profits—can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson in the case of *Masterton vs. Brooklyn* (7 Hill, 69), they are the direct and immediate fruits of the contract, they are free from this objection; they are then 'part and parcel' of the contract itself, entering into and constituting a portion of its very elements; something stipulated for the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense." (Also see *United States vs. Spee et al.*, 8 Wall., 77.)

In the *Masterton v. Brooklyn* case, cited by the Supreme Court in the above quotation, the plaintiffs contracted with the corporation of Brooklyn to furnish all the marble necessary for the erection of a certain public building. After part performance defendants refused to complete contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay.

The reasons for the application of this more equitable rule in the *Behan* case were not nearly so clear and strong as in the *Parish* case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits,

therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *Behan v. United States*.

In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the Parish case. At all events, there is no doubt that the law is properly stated in the Behan case. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our Republic, and is recognized everywhere as the only equitable one that can be applied in the premises.

The propositions contained in the bill which we here report were embraced in a House bill in the last Congress and favorably reported. In that report the committee state that "the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court in *United States v. Behan*."

The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts. It is the opinion of your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

If the United States still owes the claimant, this fact will be disclosed and he will be paid; if it does not owe him, that will also be brought to light; and in either event a final determination be reached.

Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates.

Asst. Q. M. Gen. Robert Allen, who had charge of the Department of the Mississippi Valley during the civil war, with headquarters at St. Louis, Mo., and Louisville, Ky., in an official letter to Secretary of War Hon. W. W. Belknap, in March, 1873, said:

WASHINGTON, D. C., March 10, 1873.

DEAR SIR: The bearer of this, J. W. Parish, is a gentleman with whom I am well acquainted and can vouch for his integrity and trustworthiness in any condition of life.

Very truly,

ROBERT ALLEN,
*Brevet Major-General and Assistant
Quartermaster-General, U. S. A.*

Hon. W. W. Belknap, Secretary of War.

General Allen, in another letter to the Secretary of War in 1873, commending the patriotic spirit of J. W. Parish & Co., and others that came under his notice, said:

"For such as came to the front in the dark hours of the Government's peril, with their money and credit, as did J. W. Parish & Co., Pomroy & Benton, Child, Pratt & Fox, of St. Louis; Solomon Sturges & Sons, of Chicago, with other firms, ought now to be met by the Government with a liberal spirit, for they proved themselves true and patriotic citizens of the Republic, and their efforts were greatly appreciated at that time by Government officials at St. Louis and Washington, and of course were valuable to the regiments in the field, and surely deserve the best attention of Congress and the Executive Departments, for it is a well-known fact that in the beginning of the war their acts started many a regiment to the front, and at a time the Government was in a helpless condition, without money or credit."

Hon. C. A. Dana, Assistant Secretary of War, in an official report to Secretary Stanton, dated January 27, 1864, says that—

"Parish & Co. faithfully executed their contract for ice last year at considerable loss."

Bills for the relief of Mr. Parish were introduced in the Fiftieth Congress and each succeeding Congress. Some of these have proposed to remedy the alleged injustice by allowing interest, while others have provided for a direct appropriation. On at least five of — which will safeguard the interests of the Government and do justice to the claimant.

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DEFENDANT'S EXHIBIT No. 11.

House of Representatives, 55th Congress, 2d Session.

Report No. 119.

Joseph W. Parish.

January 12, 1898—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Graff, from the Committee on Claims, submitted the following report.

[To accompany H. R. 1474.]

The Committee on Claims, to whom was referred the bill (H. R. 1474) to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due, having had the same under consideration, report the same to the House, recommending the passage of the bill, and submit the following report thereon:

On the 5th day of March, 1863, Mr. Parish, in company with one William L. Huse, under the firm name of J. W. Parish & Co., contracted with the United States to "deliver at Memphis, Tenn., Nash-

ville, Tenn., St. Louis, Mo., and Cairo, Ill., the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This ice was intended for use in the hospitals and in the field for the sick and wounded soldiers of the Army.

The price to be paid for the ice, as the same should be delivered at these various points, was stipulated in the contract, and the quantity left to be determined by the Government.

The matter of quantity was quickly settled by the assistant surgeon-general in an order to the contractors under date of March 25, 1863, fixing it at 30,000 tons. This order also directed 20,000 tons of the ice to be delivered at Nashville and Memphis "without delay." Thus in twenty days from its date the contract became definite and determined as to amount, price, places, and time of delivery.

Very soon after this contract was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish.

The contractor at once commenced the purchase of ice, and within a week had succeeded in securing sufficient to fill the entire contract. Large portions of this were purchased at Ogdensburg and Kingston, on the St. Lawrence River, and at Lake Pépin, in Minnesota—long distances from the places of delivery.

After such purchases were all made and the contractor stood ready to fulfill his contract he was notified by the said assistant surgeon-general that the Surgeon-General of the Army had directed that the order above referred to should be suspended "until further instructions." This suspension was never wholly removed. From that time to the close of the year 1863 (the date of termination of the contract) the contractor was called upon by the proper medical officers to deliver only about 12,670 tons of ice, although it appears he was during all the time ready and desirous to deliver the full amount of 30,000 tons, as the assistant surgeon-general had directed, and frequently tendered the same.

Parish could not dispose of the ice he had purchased on the requisition of the assistant surgeon-general, because the order to purchase 30,000 tons was only "suspended" and he might be called upon at any moment to complete his contract, and if the ice had been disposed of it would have been impossible to obtain an additional supply. The contract terminated and the balance of the ice melted away and was a total loss.

The claimant first applied to the executive department of the Government for relief. And after the delays incident to the prosecution of a claim before the Departments, and utterly failing in his efforts in that direction, he applied to Congress.

On May 30, 1872, an act was approved which authorized the Court of Claims to hear and determine his claim. A large amount of testimony was taken at great expense and the case finally brought to a hearing. The court entered a decree dismissing the petition on the ground that Assistant Surgeon-General Wood had no authority to determine the quantity of ice that would be required, and that his action therein was wholly nugatory.

From this decree an appeal was taken to the Supreme Court. The decision below was reversed, the Supreme Court holding that the acts of the assistant surgeon-general were the acts of the Surgeon-General and bound the Government.

The facts in the case were found by the Court of Claims. They are reported in 12 Court of Claims Reports, 609-617. The ninth finding reads as follows:

IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid.

The Supreme Court entirely overlooked this finding, declaring that the claimant did not offer to deliver the ice. The result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties. That there may be no misapprehension on this point we quote from the opinion of the court delivered by Justice Miller (10 Otto, 500):

If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price of all those amounts, they should have delivered, or tendered or offered to deliver, and demanded payment.

If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government
194 liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or, rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

In point of fact, the order was never revoked, but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require, accept, and pay for part of it. The balance was never delivered or tendered.

Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they can not recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost.

It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to de-

liver the ice. If he had offered to deliver it, then the court admits that his measure of damages would have been "the contract price of the ice or the profits he might have made if he had done so."

But on the false assumption that no delivery was tendered, the court laid down the rule that the claimants were only "entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

In the case of the *United States v. Behan*, 110 U. S., 338, which was decided four years later than the *Parish* case, and which is now the rule, the court laid down the rule as follows:

The *prima facie* measure of damages for the breach of contract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton v. Brooklyn* (7 Hill, 69), they are the direct and immediate fruits of the contract, they are free from this objection; they are then "part and parcel" of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense. (Also see *United States v. Speed et al.*, 8 Wall., 77.)

The reasons for the application of this more equitable rule in the *Behan* case were not nearly so clear and strong as in the *Parish* case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *Behan v. United States*.

In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the *Parish* case. At all events, there is no doubt that the law is properly stated in the *Behan* case. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our Republic, and is recognized everywhere as the only equitable one that can be applied in the premises.

The propositions contained in the bill which we here report were embraced in a House bill in the last Congress and favorably reported from this committee. In that report the committee states that "the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court in *United States v. Behan*."

The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts. It is the opinion of your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

If the United States still owes the claimant, this fact will be disclosed and he will be paid; if it does not owe him that will also be brought to light, and in either event a final determination be reached.

Your committee therefore recommend the passage of the bill.

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DEFENDANT'S EXHIBIT No. 12.

Calendar No. 1601.

56th Congress, 1st Session.

Senate.

Report No. 1628.

Joseph W. Parish.

June 2, 1900.—Ordered to be Printed.

Mr. Mason, from the Committee on Claims, submitted the following

Report.

[To accompany S. 2260.]

The Committee on Claims to whom was referred the bill (S. 2260) to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due, having had the same under consideration, report the same to the House, recommending the passage of the bill, and submit the following report thereon:

On the 5th day of March, 1863, Mr. Parish, in company with one William L. Huse, under the firm name of J. W. Parish & Co., contracted with the United States to "deliver at Memphis, Tenn., Nash-

ville, Tenn., St. Louis Mo., and Cairo, Ill., the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This ice was intended for use in the hospitals and in the field for the sick and wounded soldiers of the Army.

The price to be paid for the ice, as the same should be delivered at these various points, was stipulated in the contract, and the quantity left to be determined by the Government.

The matter of quantity was quickly settled by the assistant surgeon-general in an order to the contractors under date of March 25, 1863, fixing it at 30,000 tons. This order also directed 20,000 tons of the ice to be delivered at Nashville and Memphis "without delay." Thus in twenty days from its date the contract became definite and determined as to amount, price, places, and time of delivery.

Very soon after this contract was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish.

The contractor at once commenced the purchase of ice, and within a week had succeeded in securing sufficient to fill the entire contract. Large portions of this were purchased at Ogdensburg and Kingston, on the St. Lawrence River, and at Lake Pepin, in Minnesota—long distances from places of delivery.

197 After such purchases were all made and the contractor stood ready to fulfill his contract he was notified by the said assistant surgeon-general that the Surgeon-General of the Army had directed that the order above referred to should be suspended "until further instructions." This suspension was never wholly removed. From that time to the close of the year 1863 (the date of termination of the contract) the contractor was called upon by the proper medical officers to deliver only about 12,670 tons of ice, although it appears he was during all the time ready and desirous to deliver the full amount of 30,000 tons, as the assistant surgeon-general had directed, and frequently tendered the same.

Parish could not dispose of the ice he had purchased on the requisition of the assistant surgeon-general, because the order to purchase 30,000 tons was only "suspended" and he might be called upon at any moment to complete his contract, and if the ice had been disposed of it would have been impossible to obtain an additional supply. The contract terminated and the balance of the ice melted away and was a total loss.

The claimant first applied to the executive department of the Government for relief. After the delays incident to the prosecution of a claim before the Departments, and utterly failing in his efforts in that direction, he applied to Congress.

On May 30, 1872, an act was approved which authorized the Court of Claims to hear and determine his claim. A large amount of testimony was taken at great expense and the case finally brought to a hearing. The court entered a decree dismissing the petition on the ground that Assistant Surgeon-General Wood had no authority to determine the quantity of ice that would be required, and that his action therein was wholly nugatory.

From this decree an appeal was taken to the Supreme Court. The decision below was reversed, the Supreme Court holding that the acts of the assistant surgeon-general were the acts of the Surgeon-General and bound the Government.

The facts in the case were found by the Court of Claims. They are reported in 12 Court of Claims Reports, 609-617. The ninth finding reads as follows:

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The Supreme Court entirely overlooked this finding, declaring that the claimant did not offer to deliver the ice. The result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties. That there may be no misapprehension on this point we quote from the opinion of the court delivered by Justice Miller (10 Otto, 500):

If claimants intend to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price of all those amounts, they should have delivered, or tendered, or offered to deliver, and demanded payment.

If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or, rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

In point of fact, the order was never revoked, but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require, accept, and pay for part of it. The balance was never delivered or tendered.

Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they can not recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost.

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liver the ice. If he had offered to deliver it, then the court admits that his measure of damages would have been "the contract price of the ice or the profits he might have made if he had done so."

But on the false assumption that no delivery was tendered, the court laid down the rule that the claimants were only "entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

In the case of the *United States v. Behan* (110 U. S.), 338, which was decided four years later than the *Parish* case, and which is now the rule, the court laid down the rule as follows:

The prima facie measure of damages for the breach of contract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But

199 when, in the language of Chief Justice Nelson, in the case of *Masterton v. Brooklyn* (7 Hill, 69) they are the direct and immediate fruits of the contract, they are free from this objection; they are then "part and parcel" of the contract itself, entering into and constituting a portion of its very elements; something stipulated for the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense. (Also see *United States v. Speed et al.*, 8 Wall., 77.)

In the *Masterton v. Brooklyn* case, cited by the Supreme Court in the above quotation, the plaintiffs contracted with the corporation of Brooklyn to furnish all the marble necessary for the erection of a certain public building. After part performance defendants refused to complete the contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay.

The reasons for the application of this more equitable rule in the *Behan* case were not nearly so clear and strong as in the *Parish* case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *Behan v. United States*.

In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the Parish case. At all events, there is no doubt that the law is properly stated in the Behan case. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our Republic, and is recognized everywhere as the only equitable one that can be applied in the premises.

The propositions contained in the bill which we here report were embraced in a House bill in the last Congress and favorably reported. In that report the committee state that "the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court in *United States v. Behan*."

The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts. It is the opinion of your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

If the United States still owes the claimant, this fact will be disclosed and he will be paid; if it does not owe him, that will also be brought to light, and in either event a final determination be reached.

Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates.

Asst. Q. M. Gen. Robert Allen, who had charge of the Department of the Mississippi Valley during the civil war, with headquarters at St. Louis, Mo., and Louisville, Ky., in an official letter to Secretary of War Hon. W. W. Belknap, in March, 1873, said:

WASHINGTON, D. C., March 10, 1873.

DEAR SIR: The bearer of this, J. W. Parish, is a gentleman with whom I am well acquainted and can vouch for his integrity and trustworthiness in any condition of life.

Very truly,

ROBERT ALLEN,
*Brevet Major-General and Assistant
Quartermaster-General, U. S. A.*

Hon W. W. Belknap, Secretary of War.

General Allen, in another letter to the Secretary of War in 1873 commending the patriotic spirit of J. W. Parish & Co., and others that came under his notice, said:

For such as came to the front in the dark hours of the Government's peril with their money and credit, as did J. W. Parish, & Co., Pomroy & Benton, Child, Pratt & Fox, of St. Louis; Solomon Stur-

gess & Sons, of Chicago, with other firms, ought now to be met by the Government with a liberal spirit, for they proved themselves true and patriotic citizens of the Republic, and their efforts were greatly appreciated at that time by Government officials at St. Louis and Washington, and of course were valuable to the regiments in the field, and surely deserve the best attention of Congress and the Executive Departments, for it is a well-known fact that in the beginning of the war their acts started many a regiment to the front, and at a time the Government was in a helpless condition, without money or credit.

Hon. C. A. Dana, Assistant Secretary of War, in an official report to Secretary Stanton, dated January 27, 1864, says that—

Parish & Co. faithfully executed their contract for ice last year at considerable loss.

Bills for the relief of Mr. Parish were introduced in the Fiftieth Congress and each succeeding Congress. Some of these have proposed to remedy the alleged injustice by allowing interest, while others have provided for a direct appropriation. On at least five of these there have been favorable reports.

Your committee therefore recommend the passage of this bill, which will safeguard the interests of the Government and do justice to the claimant.

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PLAINTIFF'S EXHIBIT No. 24.

In Re Estate of JOSEPH W. PARISH, Deceased.

No. 12677.

Petition of Emily E. Parish, Executrix, for the probate of the last Will and Testament and Letters Testamentary in re Joseph W. Parish, in which Cole & Donaldson and Jesse E. Potbury appear as solicitors for Emily E. Parish, filed January 27, 1905.

Waiver of Citation and Consent of Grant Parish, of January 27, 1905, in which Cole & Donaldson and Jesse E. Potbury appear as Attorneys, for petitioner, Emily E. Parish.

Order of Publication in probate of Will, January 21st, 1905: Cole & Donaldson and Jesse E. Potbury, Attorneys.

Summons in Probate of Will to James H. Parish, dated Feb. 13, 1905, in which Cole & Donaldson and Jesse E. Potbury are named as Attorneys.

Affidavit of Arthur D. Marks, Business Manager of the Times Company, as to the publication of notice for the probate of the will of Joseph W. Parish, deceased, in which notice of publication in said newspaper Cole & Donaldson and Jesse E. Potbury appear as Attorneys, filed March 15, 1905.

Similar notice of publication, with names of same attorneys published in the Washington Law Reporter, filed March 29, 1905.

Order to the Clerk of the Probate Court to withdraw appearance of Cole & Donaldson as Attorneys for Executrix Emily E. Parish, filed Oct. 23, 1905.

In Administration Docket No. 33 are recorded the appearance of Cole & Donaldson and Jesse E. Potbury above noted.

PLAINTIFFS' EXHIBIT No. 25.

In the Supreme Court of the District of Columbia.

In Equity. No. 28561.

McGOWAN et al.

vs.

PARISH et al.

To E. L. White, Examiner:

Please note on the record of the proceedings before you in the taking of testimony in the above-entitled cause that the taking of testimony in chief on behalf of the complainants is, this 30th day of March, 1910, concluded, the complainants reserving the right to give in evidence on behalf of complainants a copy of the 202 Power of Attorney given by Joseph W. Parish to J. H. McGowan after the passage of the Act of Congress of February 17th, 1903; a copy of the argument filed by Messrs. McGowan, Brookshire and Morey with the Auditor of the War Department on or about the 20th of March, 1903; a copy of settlement certificate 23,729, transmitted to the Secretary of the Treasury, under the provisions of the Act above referred to; and a copy of the will of Jonas H. McGowan.

March 30th, 1910.

OFFICE OF AUDITOR FOR WAR DEPARTMENT,
RECORDS DIVISION, Mar. 25, 1903.

Know all men by these presents, That I Joseph W. Parish, being the same Joseph W. Parish who is named in the Act of Congress numbered Private 469, and approved February 14, 1903, entitled "An Act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due," have made, constituted and appointed, and by these presents do make, constitute and appoint, J. H. McGowan, Esquire, an Attorney at Law having offices in Rooms 22 & 23 Glover Building, 1419 F Street, N. W., Washington, District of Columbia, as my true and lawful Attorney, for me and in my place, and stead, to represent my interests before the Treasury Department, and any other Department where the same may be involved, and before the President of the United States, or in any Executive office in connection with the prosecution and determination of my rights under the Act of Congress aforesaid, giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirm-

ing all that my said Attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal this 25th day of March, A. D. 1903.

(S'g'd)

JOSEPH W. PARISH. [SEAL.]

DISTRICT OF COLUMBIA,

City of Washington, ss:

On the 25th day of March, A. D. 1903, before me, a Notary Public in and for said District and City, personally came Joseph W. Parish, known to me to be the identical person whose name is subscribed to the foregoing Power of Attorney, who then acknowledged the execution thereof as his own free act and deed for the purposes therein set forth.

Given under my hand and seal the day and year above written.

(S'g'd)

MYDDELTON WOODVILLE,

Notary Public.

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I hereby certify that the foregoing is a copy of the original.

[SEAL.]

RYLAND W. JOYCE,

Notary Public.

(Received Mar. 20, 1903. Auditor.)

In the Matter of the Claim of JOSEPH W. PARISH Against THE UNITED STATES.

To the Honorable the Secretary of the Treasury.

SIR: Under the Act of Congress, approved February 17th, 1903, the claim of Joseph W. Parish, based on the contract mentioned in said Act, is referred to the Secretary of the Treasury for examination and payment of any balance found due.

The said Act authorizes and directs the Secretary of the Treasury to make full and complete examination into said claim, and determine and ascertain the full amount which should have been paid said Parish if the said contract had been carried out in full, without change or default by either of the parties thereto, under the rule for the measure of damages as laid down by the Supreme Court of the United States in the case of the United States vs. Behan, 110 U. S., 338, and in accordance with the evidence in the case collected by the United States Court of Claims, and, after determining the full amount thus due said Parish under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made said Parish, whether in pursuance of judgments of the Court, or by direct appropriation by Congress, or otherwise, stating what balance, if any, is due, under the rule and evidence aforesaid, and pay the balance to said Parish—appropriation being made therefor.

Under the terms of the contract by which the claimant was to furnish the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee—St. Louis, Missouri—and Cairo, Illinois, during the remainder of the year 1863; and under the order

of Assistant Surgeon General Brown, to furnish fixed amounts at each of these places, which order the Supreme Court of the United States, in *Parish vs. U. S.* (100 U. S., 500), declared to be binding on the United States as part of the contract, the obligations of the claimant became definitely fixed.

Therefore, if there had been neither change nor default, said Parish, under his contract, would have delivered ice to the United States, and received therefor, as follows:

5,000 tons at St. Louis at \$16 per ton.....	\$80,000.00
5,000 tons at Cairo at 20 per ton.....	100,000.00
10,000 tons at Memphis at 20 per ton.....	200,000.00
10,000 tons at Nashville at 25 per ton.....	250,000.00

or 30,000 tons for which he would have rec'd..... \$630,000.00

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The evidence shows that he delivered 12,770 22/24 tons for which he received (page 6).....	\$242,489.15
Leaving balance due said Parish in case no change had been made in the contract.....	387,510.85
Representing the value of the ice, contract price, remaining on Parish's hands; or, in tons, the difference between 30,000 and 12,770 22/24, to wit: 17,229 2/24 Through Congress and the Court of Claims Parish received, representing the cost, etc., of the undelivered ice	\$69,261.69

Leaving balance unaccounted for..... \$318,249.16

In order to determine the balance due Parish, the rule for the measure of damages in the case of the *United States vs. Behan*, *supra*, is to be applied.

The acts direct the Secretary to treat the contract as though completed, without change or default by either party. This necessarily precludes any consideration of the questions before the Court of Claims other than evidence showing or tending to show the quantity of ice which Parish was prohibited from delivering, and what it would have cost to deliver the same.

It is submitted, therefore, that Parish, under the *Behan* case, is entitled to the contract price of the ice undelivered, less what it would have cost to deliver it, after deducting therefrom whatever payments may have been made through the Court of Claims or by direct appropriation; in other words, \$318,249.16 less the cost of delivery of 17,229 2/24 tons.

The question is thus narrowed down to the cost of transportation, or delivery, of the ice. While it is apparent from the evidence that Parish had abundance of ice at Chicago and Lake Pepin to fully meet the demands of his contract, yet he was not confined to these sources of supply. It is in evidence that ice could have been secured by him from points along the St. Lawrence. But the evidence as to cost of transportation relates almost wholly to transporting from

Chicago and Lake Pepin. We therefore confine the computation which follows to the proven costs from those two points, and as to these the evidence is clear. See testimony of James L. Huse, page 10; Robert C. Scanland, page 14; Peter Conrad, pages 14 and 15; Isaac Harmon page 30, and Joel H. Wicker, page 33; and Joseph W. Parish, page 213—letter.

There should have been delivered at St. Louis...	5,000	tons
There were delivered.....	4,175 20/24	"
Leaving balance undelivered.....	824 4/24	"
There should have been delivered at Cairo.....	5,000	"
There were delivered.....	1,388 7/24	"
Leaving balance undelivered.....	3,611 17/24	"
205		
There should have been delivered at Memphis...	10,000	"
There were delivered.....	6,456 19/24	"
Leaving balance undelivered.....	3,543 5/24	"
There should have been delivered at Nashville..	10,000	"
There were delivered.....	750	"
Leaving balance undelivered.....	9,250	"
Applying the amount of ice left on hand at Chicago, to wit: 4,129 tons, as admitted by Surgeon General Barnes, towards filling the order for St. Louis, and taking cost of transportation at \$4 per ton, see evidence, pages 30 and 33, we have 824 4/24 tons at \$4 per ton.....		\$3,296.66
Deducting the 824 4/24 tons from the Chicago ice, 4,129 tons, we have 3,304 20/24 tons to apply towards filling the order at Cairo; and taking cost of transportation at \$5 per ton, see evidence, pages 10, 30 and 33, we have 3,304 20/24 tons (which exhausts the Chicago ice), at \$5 per ton.....		16,524.16
There still remains to be supplied at Cairo the difference between 3,611 17/24 tons and 3,304 20/24 tons, or 306 21/24 tons, which would, if transported from Lake Pepin, cost, see evidence pages 10, and 15, \$6 per ton.....		1,841.25
The balance to be supplied at Memphis, 3543 5/24 tons, would, if transported from Lake Pepin at \$8 per ton, see evidence, pages 10 and 15, cost.....		28,345.66
The balance to be supplied at Nashville, 9,250 tons, would, if transported from Lake Pepin at \$9 per ton, see evidence, pages 10 and 15, cost.....		83,250.00
Making total Cost for Transportation.....		\$133,257.73

Our statement now shows that there was a total due on undelivered ice.....	\$318,249.16
Total cost of delivering same by ordinary public methods	133,257.73
Leaving due claimant on this method of computation..	\$184,991.82

But it is seen that we have allowed for transporting 824 $4\frac{1}{2}$ tons of ice from Chicago to St. Louis at \$4 per ton, \$3,296.66, and 3304 $20\frac{1}{4}$ from the same point to Cairo at \$5 per ton, \$16524.16. These two sums aggregate \$19,820.82. Deducting this amount from the entire cost of transporting all the undelivered ice, namely \$133,257.73, we have \$113,436.91 as the entire cost of transportation from Lake Pepin. The evidence discloses that Parish had a fleet of barges of his own that was to be used in delivering this ice, and that by so doing he would have saved from the ordinary cost, as given above, from 25% to 33 $\frac{1}{4}$ %. See evidence pages 11 and 206 31 and 12 — 31. Taking the smaller percentage, as given in this testimony, it would show that had he delivered the Lake Pepin ice by *by* means of his own vessels, as he certainly was entitled to do, the cost would have been \$113,436.91, less 25%, \$28,359.23, which would make such cost \$85,077.68.

This would make the total cost of delivery:

From Chicago.....	\$19,820.82
" Lake Pepin	85,077.68
Total	\$104,898.50

Thus the gross balance due Parish under the present

Act, as given above, is.....	\$318,249.16
Deducting the total cost of delivery, as now found....	104,898.50
Leaves due claimant.....	\$213,340.66

In the above computations we have not used the minimum cost of transportation as the same appears in the evidence, and we have made no effort to state a maximum claim. Had we done so we would have been within a well-known rule of law. The contractor who is prevented by the other party to the contract from fully carrying out the contract, is entitled to the presumption that he would have performed it in the most economical way consistent with its terms. But under all the circumstances we shall rest content with the results here reached, and have thus fixed our claim, as above, at \$213,340.66.

Respectfully submitted,
(S'g'd)

J. H. MCGOWAN,
Att'y for Claimant.

P. S.—We submit this statement, and as a part of it, House Report No. 2104, 57th Congress, 1st Session, which Report embraces Senate Report No. 351, of the same Session. As these reports were unanimously agreed upon by the committees, composed largely

of lawyers, we ask Special consideration to the elucidation of the rule of damages in the Behan case, as presented therein.

Respectfully,

(S'g'd)

J. H. MCGOWAN.

Encl.

I hereby certify that the foregoing is a copy of the original.

[SEAL.]

RYLAND W. JOYCE,

Notary Public.

207 Form 358.

File 58743.

(Copy of Certificate of Settlement.)

No. 23729.

Claim No. 143,880.

J. B. G.

414.

TREASURY DEPARTMENT,

OFFICE OF THE AUDITOR FOR THE WAR DEPARTMENT,

WASHINGTON, D. C., August 11, 1903.

I certify that I have examined and settled the claim of Joseph W. Parish and find that there is due from the United States the sum of One Hundred and Eighty One Thousand Three Hundred and Fifty Eight dollars and Ninety Five cents (\$181,358.95) for amount found due him under act of Congress approved February 17, 1903 (Private No. 469) for ice under contract with J. W. Parish & Co., dated March 5, 1863, as follows:

5,000 tons at St. Louis, Mo., at \$16.00 per ton.....	\$80,000.00
5,000 tons at Cairo, Ills., at 20.00 per ton.....	100,000.00
10,000 tons at Memphis, Tenn., at 20.00 per ton....	200,000.00
10,000 tons at Nashville, Tenn., at 25.00 per ton....	250,000.00
Total.....	\$630,000.00

From which deduct as follows:

Payments by Medical Department....	\$129,738.33
Settlements by Second Auditor's Office.	171,072.69
Award by the Court of Claims.....	10,444.91
Amount of transportation saved by the non-delivery of 17,228 $\frac{7}{8}$ tons ice..	137,385.12
	<hr/> 448,641.05

Leaving due the above sum.

Appropriations: "Relief of Joseph W. Parish" (Private No. 469, Act approved February 17, 1903).

Payable as follows: To Claimant, care of Attorney, J. H. McGowan, Washington, D. C.

To the Secretary of the Treasury (Division of Bookkeeping and Warrants).

F. E. RITTMAN,

Auditor for the War Department.

208 A Statement Showing the Amount of Ice Delivered by J. W. Parish & Co. at St. Louis, Mo.; Cairo, Ills., and Memphis and Nashville, Tenn., under Their Contract Dated March 5, 1863, and the Amount Paid Them Therefor, and Also for the Ice Which Melted in Transitu and the Undelivered Ice.

At St. Louis:

April	9, 1863.	1,162	tons at \$16.00 per ton..	\$18,592.
"	"	910 1/2	" " " " " "	14,568.
"	21, "	133 1/3	" " " " " "	2,133.33
June	2, "	1,423 2/3	" " " " " "	22,778.67
<hr/>				
3,629 1/2 tons.....				\$58,072.00

At Cairo:

May	16, 1863.	240	tons at \$20.00 per ton..	\$4,800.
July	6, "	307	" " " " " "	6,140.
Oct.	17, "	473 5/8	" " " " " "	9,472.50
<hr/>				
1,020 5/8 tons.....				\$20,412.50

At Memphis:

May	11, 1863.	1,920	tons at \$20.00 per ton..	\$38,400.
"	30, "	436 1/2	" " " " " "	8,730.
June	6, "	420 3/4	" " " " " "	8,415.
"	27, "	510 1/2	" " " " " "	10,210.
July	8, "	1,121 1/2	" " " " " "	22,430.
Aug.	4, "	620	" " " " " "	12,400.
"	10, "	91 3/4	" " " " " "	1,835.
"	14, "	466 5/6	" " " " " "	9,336.67
Sept.	25, "	403	" " " " " "	8,060.
<hr/>				
5,990 5/6 tons.....				\$119,816.67

At Nashville:

July	18, 1863.	497	tons at \$25.00 per ton..	\$12,425.
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Summary:

St. Louis,	3,629 1/2 tons.....	\$58,072.
Cairo,	1,020 5/8 "	20,412.50
Memphis,	5,990 5/6 "	119,816.67
Nashville,	497 " 11,137 23/24.....	12,425.

Total for ice delivered..... \$210,726.17

209 Ice melted in transitu:

St. Louis,	546 1/3 tons at \$16.00 per ton.....	\$8,741.33 1/3
Cairo,	367 2/3 " " 20.00 " "	7,353.33 1/3
Memphis,	466 1/6 " " " "	9,323.33 1/3
Nashville,	253 " " (25) 1,633 1/6.....	6,325.
<hr/>		12,771 1/8

Total for ice melted..... \$31,743.

Ice not delivered by contractors:

Sett. 6228 of 1886, 17,228 $\frac{7}{8}$ tons at cost, expenses,
etc. \$58,341.85

Awards by the Court of Claims for ice, &c.:

No. 2480, January 7, 1867, for \$11,230.50
 " 6492, March 9, 1881, " Wt. 1415 June 7,
 1881* 10,444.91
 Total \$21,675.41

*No. 225106.

*Heretofore deducted—See last page of report of Surgeon General
in Sett 6228.

Add cost of delivery 17,228 $\frac{7}{8}$ tons ice at the places
named in contract \$137,385.12

5,000 tons at St. Louis \$80,000.00
 5,000 " " Cairo 100,000.00
 10,000 " " Memphis 200,000.00
 10,000 " " Nashville 250,000.00
 Total \$630,000.00

Ice Account:

	Delivered.	Melted.	Shortage.	Total.
St. Louis...	3,629 1/2	546 1/3	824 1/6	5,000.
Cairo	1,020 5/8	367 2/3	3,611 17/24	5,000.
Memphis ..	5,990 5/6	466 1/6	3,543	10,000.
Nashville ..	497	253	9,250	10,000.
Total	11,137 23/24	1,633 1/6	17,228 7/8	30,000.

Cost of transportation on ice:

St. Louis,	824 1/6 tons at	\$5.00.....	\$4,120.87
Cairo,	3,611 17/24 " "	6.00.....	21,670.25
Memphis,	3,543 " "	8.00.....	28,344.00
Nashville,	9,250 " "	9.00.....	83,250.00
Total.	17,228 7/8		\$137,385.12

210 Cost of undelivered ice:

St. Louis,	824 1/6 tons.....	\$13,186.67
Cairo,	3,611 17/24 "	72,234.16
Memphis,	3,543 "	70,860.00
Nashville,	9,250 "	231,250.00
		<u>\$387,530.83</u>

The account will then stand as follows:

30,000 tons ice at contract price..... \$630,000.00

From which deduct as follows:

For 12,771 1/8 tons ice delivered..... \$210,726.17

" 1,633 1/6 " " melted in transitu..... 31,743.

" 17,228 7/8 " " cost, expenses, etc..... 58,341.85

10,444.91

Awards by Court of Claims..... *[21,675.41]

Cost of transportation on 17,228 7/8 tons 137,385.12

448,641.05

Total *[459,871.53]

\$181,358.95

Leaving due claimant..... *[\$170,128.47]

[* Figures inclosed in brackets erased in copy.]

In making the above statement all the ice contracted for has been allowed at the contract price for each place, and all payments made to Joseph W. Parish & Co. and to J. W. Parish, by the Medical Department of the Army, by Treasury Settlements, and by two Awards by the Court of Claims, and also the cost of the transportation of the undelivered ice to the points of delivery, have been deducted. The evidence shows that the rate from Chicago and Lake Pepin was the same (Chicago by Rail and Lake Pepin by Barge) viz: St. Louis \$5.00; Cairo \$6.00; Memphis \$8.00, and Nashville \$9.00.

April 28, 1903.

JOHN B. GILFILLIN, *Clerk.*

E. P. SEEDS,
Dep'ty Aud.

I hereby certify that the foregoing is a true and correct copy of a statement now on file in the office of the Auditor for the War Department showing the computations made by said Auditor under the Act of February 17, 1903, in the claim of J. W. Parish as referred to in said act and as finally found by said Auditor.

[SEAL.]

RYLAND W. JOYCE,
Notary Public, D. C.

211 I, Jonas H. McGowan, now residing in the City of Washington, District of Columbia, being of sound mind and memory, do hereby make, publish and declare this my last will and testament in the words and figures following, that is to say:

First. I hereby give, devise, and bequeath to my wife, Josephine P. McGowan, should she survive me, all of my estate, personal, real, and mixed, of every name and nature, wherever the same may be

found, to have and hold the same to her own use and behoof forever.

Second. Should my said wife die before I do, then, and in that event, I give, devise and bequeath all of my said estate to my daughter, Ruth McGowan, or, in case of her death, to the heirs of her body, to have and hold the same to her and their own use and behoof forever.

Third. I hereby constitute and appoint my said wife the sole executrix of this, my said will and testament, but in case of her death before I shall have died, then I constitute and appoint my said daughter, Ruth, the sole executrix of this my said will, and direct that whichever one shall become executrix by reason of the conditions hereof, she shall be exempt from giving any bond or bonds as such executrix.

It is further my will, and I so direct, that in case neither my said wife nor my said daughter, who is our sole surviving child, nor any child or children of my said daughter, shall survive me, or that we should all die at one time, that my estate shall be divided into two equal parts, one part to be paid to my heirs and one part to be paid to the heirs of my said wife, the said heirs and their respective shares to be determined by the laws of the District of Columbia relating to such matters, in force at the time when this clause shall take effect.

The last clause is made in recognition of the fact that whatever fortune is now owned by myself, or by my said wife, or by us jointly, is entirely the result of our own efforts and this is likely to be true as to whatever fortune we may have when we die.

And in case of the things happening as set forth in the last two preceding paragraphs, and my estate is to be divided between my own heirs and those of my wife, it is my will, and I hereby appoint the Washington Loan and Trust Company of Washington, D. C., as the executor and trustee for such purpose. And I hereby declare all wills and codicils heretofore made by me, void.

The above instrument written on this one sheet of fools-cap paper, I declare to be my last will and testament.—In witness whereof, I have hereunto set my hand this second day of June, one thousand nine hundred and one.

JONAS H. MCGOWAN.

The above and foregoing instrument was signed in our presence by said Jonas H. McGowan, whom we believe to be of sound mind and memory, and who declared the same to be his last will and testament, and, at his request, and in his presence, and in the presence of each other we have subscribed our names as witnesses hereto the day and year above written.

MYDDLETON WOODVILLE,
3045 N St., Washington, D. C.
FORREST F. FADELEY,
2023 N St., Washington, D. C.
ARTHUR N. MARR,
1318 Corcoran St., Washington, D. C.

I hereby certify that the foregoing is a true copy of the last will and testament of Jonas H. McGowan, as probated.

[SEAL.]

RYLAND W. JOYCE,

Aug. 3/09.

Notary Public.

Filed Apr. 24, 1908. James Tanner, Register of Wills, D. C.,
Clerk of Probate Court.

Copy.

Form No. 63.

In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 12677, Administration Docket.

Estate of JOSEPH W. PARISH, Deceased.

The only property left by decedent consists of some personal property of the value of about \$25.00, and the balance consisted of a claim against the United States Government. This claim has been passed upon by the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia, and is now awaiting trial on appeal in the Supreme Court of the United States. When a decision is had in that Court a final account will be rendered but until that time no account can be rendered nor anything further done in the estate.

(Signed)

Executrix Estate of Joseph W. Parish.

DISTRICT OF COLUMBIA, ss:

I, Emily E. Parish, do solemnly swear that I have read the foregoing by me subscribed and know the contents thereof; that the matters and things therein stated as of my own personal knowledge are true, and that those stated upon information and belief I believe to be true.

(Signed)

EMILY E. PARISH,

Executrix Estate of Joseph W. Parish.

213 Subscribed and sworn to before me this 24th day of April,
A. D. 1908.

HARRY H. HOLLANDER,

Notary Public, D. C.

JESSE E. POTBURY,

Attorney for Executrix.

(Endorsed:) No. 12677 Admr. Doc. Docket 33. Estate of Joseph W. Parish, Deceased. Account of Executrix. Filed up. No action of Court necessary or expectant. Filed April 24, 1908. James Tanner, Register of Wills, D. C., Clerk of Probate Court.

Opinion of the Court.

Filed August 30, 1911.

In the Supreme Court of the District of Columbia.

In Equity. No. 28561.

JONAS H. MCGOWAN and ELIJAH V. BROOKSHIRE

VS.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, et al.

This case was heard upon the pleadings and an interlocutory consent-decree and testimony, and having been fully argued and duly considered is now to be disposed of by a final decree.

The plaintiffs allege that they are attorneys at law residing in the District of Columbia, and bring their bill against Emily E. Parish, also a resident of said District, as executrix of her father, Joseph W. Parish, deceased, and against the Secretary of the Treasury and the Treasurer of the United States; that upon the 4th day of August, 1900, and for a long time prior thereto said Joseph W. Parish had, and had asserted, a claim against the United States for a large sum of money as due to him under a contract that had been made in 1863 between said Parish on the one part and the United States, through one of its medical store-keepers, on the other part, for the furnishing of a quantity of ice; that on said 4th of August, said Parish entered into a contract and agreement in writing with said McGowan, which is set out verbatim in the bill and which witnesses, that Parish employs McGowan to prosecute and collect said claim, and that in consideration of the services rendered and to be rendered by McGowan, and by others whom he might employ in the prosecution of the claim, Parish agrees to pay McGowan "a fee equal in amount to fifteen per centum of whatever sum of money or other evidence of indebtedness may be awarded or collected on account of said claim", and witnesses further that McGowan shall have control of the prosecution to its final termination, with power to receive and receipt for any draft or other evidence of indebtedness which may be issued in payment thereof, and

214 to retain from the proceeds the amount of the stipulated fee, that Parish shall furnish all evidence and papers required, and execute all necessary papers both for the prosecution of the claim and the payment of the fee, that Parish shall in no event dispose of any part of the claim, that the agreement shall not be affected by any revocation, nor by any services rendered by others, or by Parish himself, and that McGowan shall diligently prosecute the claim to the best of his professional ability and to its final determination. The plaintiffs further allege that for a long time before said 4th day of August McGowan had rendered professional services as a lawyer to Parish in the prosecution and preparation of the said claim; that thereafter McGowan continued his services

in the prosecution of the claim before Congress and various committees thereof; that on the 3rd day of December, 1902, McGowan and Parish, wishing to secure the services of said Brookshire, made an assignment to and an agreement with him in writing, which writing is set forth verbatim in the bill, but is in form an agreement between McGowan and Brookshire and signed by McGowan alone. In consideration of \$5 and other valuable consideration, McGowan thereby assigns to Brookshire an undivided one-third interest in his contract with Parish dated August 4, 1900, reciting that said agreement with Brookshire would terminate with services in the then present Congress, provided that the pending bill should not pass, but, if it should pass, would then terminate with the action of the Secretary of War and the final determination upon the claim by the executive and disbursing officers of the government. The plaintiffs further allege that on or about the 20th day of January, 1903, Parish and Brookshire themselves entered into an agreement in writing, under that date, whereby Brookshire agreed to render legal services in the prosecution of the claim under the direction of Parish, and in consideration thereof and for value received and in consideration of services theretofore rendered by Brookshire in the same matter. Parish agreed to pay Brookshire a sum equal to five per cent. of the amount awarded or appropriated for the payment of the claim, said contract to be an order upon the proper officer of the government, and to constitute a lien for the amount due Brookshire. The plaintiffs further allege that, pursuant to said agreements, they diligently prosecuted the claim, and rendered valuable services in preparing and presenting arguments before committees of Congress, in collecting evidence and presenting petitions and briefs in the effort to obtain an act of Congress for the settlement of the claim; that thereafter Congress did pass an act approved February 17, 1903, which is set forth in the bill, and which authorizes and instructs the Secretary of the Treasury "to make full and complete examination into the claim" under certain rules therein stated, and, having ascertained the balance due Parish, to pay the same to him, for which payment the act appropriated whatever sum should be necessary; that said act was drafted by McGowan and was advocated and urged in all proper ways before the several committees by both the plaintiffs; that immediately after the passage of the act, the Secretary of the

215 Treasury referred the claim to the proper officer, namely, the Auditor of the War Department, and the plaintiffs appeared before the Auditor and rendered valuable services, filing briefs and arguments, and that on the 11th day of August, 1903, said Auditor made a finding to the effect that there was a balance due Parish of \$181,358.95 and upon the same day sent McGowan as attorney for Parish a notice of the allowance, which notice is set forth in full in the bill; that on receiving the Auditor's return of his finding and award, the Secretary of the Treasury referred the claim to the Comptroller; that the plaintiffs appeared before the Comptroller and submitted elaborate arguments to him; that the Comptroller made an adverse report to the Secretary; that the

Secretary gave the claim further consideration and referred it to the Solicitor of the Treasury; that the plaintiffs appeared and made arguments before the Solicitor; that the Solicitor made an adverse report to the Secretary; that the Secretary again considered the claim, and the plaintiffs argued the matter before him at great length, and after laborious preparation; that on or about the 31st day of May, 1904, the Secretary decided the case, refusing to pay the balance ascertained by the Auditor or any sum whatever. The plaintiffs further allege that after said decision they advised with Parish as to the steps to be taken to enforce payment, and had especially under consideration the expediency of filing a petition for the writ of mandamus against the Secretary for the amount found due by the Auditor, and were still considering the question and awaiting the return of Parish to the District of Columbia until the time of his death, which occurred December 26, 1904; that Parish and his family had been in very necessitous circumstances for a long time prior to his death and to relieve their pressing wants the plaintiffs had from time to time advanced to Parish money, amounting in the whole to \$5,000, relying solely on his promise to repay the same out of said claim when received; that on April 3, 1905, the will of Parish was offered for probate in this District and, April 7, 1905, was duly admitted, and letters of administration were issued to Emily E. Parish as executrix; that the estate of Parish was represented to the court as consisting of only his wearing apparel and said claim against the government; that claims have been presented against the estate, one for \$9160.70 in favor of D. Christophani, one in favor of Emily E. Parish for \$12,000 for services claimed to have been rendered, and miscellaneous claims to the amount of \$1500; that no account has been filed by the executrix. The plaintiffs further allege that the executrix has disregarded their rights in the claim and their services in respect to it, although knowing that they were ready to continue their services, and has employed other counsel without advising with the plaintiffs, and that on May 2, 1906, by her said attorneys, she filed her petition, on the law side of this court, for a writ of mandamus to the Secretary of the Treasury, requiring him to issue a draft in her favor for the amount found due by the Auditor for the War Department, basing her petition solely on the ground that every condition precedent to payment to said Joseph W. Parish in accordance with said act of February 17, 1903, had been satisfied by an examination 216 and settlement made on August 11, 1903, by the Auditor of the War Department, (which examination and settlement, they allege, were the result of their services), and that there remained only the ministerial duty on the part of the Secretary to pay the amount found due by the Auditor; and they refer to the transcript of the record of the case in the Supreme Court of the United States and make a copy thereof a part of the bill. The plaintiffs further allege that, the Secretary having answered said petition and a demurrer to said answer having been interposed, the demurrer was sustained in this court and the petition dismissed; that on appeal from said judgment the same was affirmed by the

Court of Appeals, but in the Supreme Court of the United States, to which said cause was carried by writ of error, the judgments of the lower courts were reversed, and a writ was ordered as prayed. The plaintiffs further allege that a mandate is about to come down for the issuing of the said writ of mandamus, which will require the Secretary to issue a draft to the executrix for said sum; and they aver on information and belief that it is the declared purpose of the executrix to disregard the lien and claim of the plaintiffs, and that she and her brother, Grant Parish, have avowed that the plaintiffs shall never have a cent of the money; that said estate is insolvent except for said claim-fund, and that claims against the estate have been proved to the amount of about \$25,000 although none of them have been paid; that they are informed and believe and aver that Emily E. Parish and Grant Parish are insolvent and that if they receive the draft or its proceeds they will immediately remove the same from the jurisdiction of this court for the purpose of defrauding the plaintiffs of their rightful claim to the fund. They further allege that by reason of the premises each of them is equitable owner of one-tenth of said fund, and has a lien upon said fund in respect to said one-tenth part.

Wherefore they pray that the court will decree that McGowan is the equitable owner of one-tenth of said award and sum, and has an equitable lien on the same to that extent, and will decree likewise in respect to Brookshire; that the Secretary of the Treasury, and the Treasurer, of the United States may be enjoined from issuing any such draft for the executrix and from paying to her the amount of said award or any part thereof; that a receiver be appointed to receive the payment of said award and hold the same subject to the order of the court; that said Secretary may be restrained by a preliminary order from issuing any such draft or making any such payment; and that the plaintiffs may have such other relief as they are entitled to in equity. They also pray for process against all three defendants and that they be required to answer the bill, but not under oath, as the plaintiffs waive any answer under oath.

The bill was filed May 22, 1909, and a restraining order against the Secretary and the Treasurer, as well as against the executrix, issued as prayed, but on June 2, 1909, and before any answer was made, an interlocutory decree was entered by consent of the plaintiffs and executrix. This decree dissolved the restraining order and

dismissed the Secretary and the Treasurer, but as to the
217 executrix it provided that in respect to the sum of \$41,000, and any warrant, draft or check that might be issued therefor by the Treasury Department, or any part thereof, as being a part of said award, the executrix was enjoined from receiving any such warrant or draft or sum of money, and was required to execute a power of attorney to the Vice-President of the American Security and Trust Company, to receive and endorse said draft, in her name, and to collect the proceeds thereof, and deposit the same with the said Trust Company "to the credit of this cause and subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount, and if so what

amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for or in respect of the matters described in the bill of complaint." Said sum when deposited was to be held by the Trust Company without compensation and paying interest thereon at two per cent, "the said sum and the accrued interest thereon to be subject to the order and decree of this court in this cause". Under this decree a draft for \$41,000 was issued, and collected, and deposited, and is now in the hands of the trustee subject to the order of the court. The remainder of said fund has been received by the executrix and accounted for by her in the probate court.

The defendant by her answer admits the existence of the claim to her father against the United States and that he had been asserting the same for a long time before the 4th of August, 1900, but says she has no personal knowledge of the alleged agreement of that date between her father and McGowan, nor has she any personal knowledge of the alleged assignment of a one-third interest therein to Brookshire, or of the alleged contract between Brookshire and her father, but she says that if such contracts were made as alleged they were in violation of the Revised Statutes of the United States, section 3477, in so far as they undertook to assign any part of a claim against the United States or give the plaintiffs any lien thereon, and were to that extent null and void. She says that she has however joined in the consent-decree, whereby \$41,000 was directed to be deposited with said Trust Company to the credit of this cause, subject to the determination of the court, as hereinbefore set forth; but she charges that the utmost which either of the plaintiffs could claim would be the reasonable value of the legal services rendered by him. She does not desire to transfer the determination of the question to any other forum, but to have it decided in this forum in accordance with the rules of equity. She does not know whether the plaintiffs advocated and urged the passage of the bill and the allowance of the claim as alleged but admits the action of Congress, of the Auditor and of the Secretary as alleged. She denies that the plaintiffs advised with her father in respect to the steps to be taken to enforce payment of the award or that they had under consideration the expediency of filing a petition for a writ of mandamus, and says that they never approached her after her father's death in

218 respect to such matters, and that she never heard of the proposal to file such a petition until it came to her from the other counsel, who brought the petition; on the contrary she says that after the Secretary's refusal the plaintiffs abandoned all prosecution of the claim. She says she has no knowledge of the alleged loan of \$5,000, but that if it was made, it is barred by the statute of limitations. She says it is true that the will was proved and the letters issued as alleged, and claims against the estate have been presented as alleged, and that although she had not filed any account when the bill was brought, she has since filed one. She denies that she has disregarded the rights of the plaintiffs or that she knew that the plaintiffs were ready to render services in the further prosecution of the claim, and avers on information and belief that

one of the plaintiffs repeatedly asserted that there was no remedy by mandamus. She denies that she has any purpose to refuse to recognize any valid claim against the estate, but makes no specific answer to the charge that she was about to remove with the fund from the jurisdiction of this court. She says that all claims proved against the estate have been paid in full and her account passed and approved. She denies that either she or her brother is insolvent and calls attention to the fact that the court has now in its custody a sufficient sum to satisfy the plaintiffs' claims if they are valid. She denies however that the plaintiffs, or either of them, have any claims upon said fund. She says that if the plaintiffs had any claim against her father for services they ought to have been presented against his estate and, the time having passed wherein they should have been presented, that they are barred. She says that by his alleged contract with her father McGowan was bound to prosecute the claim diligently to the best of his ability to its final termination, and that this was the consideration for the agreement, and that there has been a breach of this contract on McGowan's part, he having failed to prosecute the claim to its final determination and having abandoned the claim so that his work had to be done by others.

McGowan has died since the bill was brought and his executrix is now prosecuting the bill in his place.

From this analysis of the pleadings it appears that the objections raised by the defendant to the plaintiffs' case are the followings:

(1) That the plaintiffs' claims, if any, are barred by their failure to have the same passed and approved by the Probate Court within the time limited by the statute.

(2) That the lien asserted by the plaintiffs is in violation of the Rev. St. sec. 3477.

(3) That even taking the contract of McGowan as it read, he has not fulfilled its condition and is therefore entitled to nothing.

(4) That the plaintiffs totally abandoned the prosecution of the claim and voluntarily relinquished all rights they may have had under their contracts.

(5) That in any view of the case the plaintiffs are entitled to nothing more than the reasonable value of their services.

(1) As to the first objection, it is unnecessary to say more than that the point is not made in the brief of the defendant and is evidently abandoned, the claims not having become due
219 until the fund was realized, which was after the expiration of the time fixed by statute for proving claims in the Probate Court.

(2) As to the second objection, that the contracts were null and void as against the statute, so far as they attempted to give a lien upon the fund sought to be recovered:

The first question is whether this objection is one that can be taken, in view of the consent-decree. That declares that the fund paid into the court shall be held "subject to the determination by the court whether any amount, and, if so, what amount, is justly due the complainants, or either of them, for professional services ren-

dered by them or either of them for and in respect of the matters described in the bill of complaint." No other question is reserved. What shall be done with the fund is declared to depend upon these two questions alone,—is anything due? If so, how much? No question touching the existence of a lien upon the original fund is reserved or mentioned. The bill is brought charging that a lien existed and charging that the defendant was insolvent and was about to remove from the jurisdiction taking the fund with her, and that she had declared her purpose to prevent the plaintiffs from realizing anything upon their claims. With no denial of these claims upon the record,—before any answer is filed,—the defendant consents that a portion of the fund in question shall be paid into court and be held by the court subject only to the determination whether she owes the plaintiffs anything upon their claims for professional services rendered and if so how much. Can there be any doubt that thereby she has eliminated the question of a lien upon the original fund, and consented that if there is anything due the plaintiffs they shall be satisfied out of the fund paid into court? We think not. After such a decree, we think, it was not open to the defendant to raise by her answer any question touching the validity of the contracts in respect to a lien. That question had been waived.

It is not maintained by the defendant that the contracts were void so far as they provided for the rendering of services by the plaintiffs and for their receiving compensation therefor. That question is settled by *Nutt v. Knut*, 200 U. S., 12. Hence we fail to see what the statute has to do with the case in its present posture.

The authority of the court to enter the decree can hardly be questioned. The court had jurisdiction, in this cause, as between the plaintiffs and the executrix, with or without consent to appoint a receiver, and put the chose in action into its hands. There was nothing in such a course that would have contravened the statute, section 3477. *Price v. Forrest*, 173 U. S. 410, 423, 424. In place of a receiver being appointed, the parties consented to the payment of a sufficient portion of the fund into court. The Government acted upon the consent of the parties, and paid the fund in accordance with their agreement as embodied in the decree. Thereafter no question could arise under the statute so far as the protection of the government was concerned, and the right of the court to adjust the equities between the principal parties was not restricted by the statute. If a receiver had been appointed and the whole fund placed in his hands, there would have been no violation of the statute, for, in that case, the receiver would have administered the whole fund under the order of the court, as was done in *Price v. Forrest*. That the court is now to administer only a part of the fund, the remainder having been disposed of by the executrix with the consent of all parties, cannot make the case less strong for the plaintiffs. Of course, except for the language of the decree, the question might still remain, whether the plaintiffs had any lien by virtue of their contracts; but this question as we have said, is eliminated by the decree which reserves only the question of indebtedness and the amount thereof.

But do the plaintiffs need to assert any lien by virtue of their written contracts? They alleged that they were creditors and that the only fund to which they could look was about to be taken out of the jurisdiction for the purpose of preventing the collection of their debts, and, before answering the bill, the defendant consents to the payment of the fund into court to be held subject to the determination of the two questions, whether the defendant is indebted to the plaintiffs, and if so to what extent. If it shall be determined that the indebtedness does exist, is it not to be paid out of the fund? Equity having jurisdiction of the case upon the face of the bill, and the parties having admitted that jurisdiction in the most solemn way by consenting to a decree, the court having signed the decree and taken the custody of the fund, and the question to be determined with respect to the fund having been distinctly stated in the decree, can the defendant now say that there are other questions to be decided affecting not only the rights of the plaintiffs but the very jurisdiction of the court?

Observe the fact in *Price v. Forrest*, and note the resemblance between that case and this. Price had a claim against the United States, which Congress directed the Secretary of the Treasury to adjust on principles of equity, and pay the sum found due to him or his heirs. It was adjusted at the sum of \$76,000 and over. Meanwhile Forrest had recovered a judgment against Price in the courts of New Jersey for \$17,000, and died without collecting it. His widow filed a petition for a receiver, stating that the money due Price on his claim against the United States was about to be paid to Price. A receiver was appointed. Then Price died, leaving no will. An administrator ad prosequendum was appointed on his estate, and Forrest's widow sought to have him made a party to the receivership case, and to have him and the other parties claiming an interest enjoined from receiving the money from the United States, and to have the fund disbursed by the receiver under the orders of the court. The heirs of Price claimed the fund; but the New Jersey court held that the plaintiffs were entitled to the moneys in the treasury under and by virtue of the order of the court appointing the receiver; and the judgment was sustained by the Supreme Court of the United States. The objection was made that the appointment of the receiver could not operate to transfer the fund because that would be contrary to Rev. St. 3477; but the court

held that such a transfer was one by operation of law and
221 did not come within the statute. The object of the statute, the court said, was not to protect the claimant but to protect the government and to prevent frauds upon the Treasury. See p. 423. We quote: "There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds

of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in any wise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States. If a court, in an action against such claimant by one of his creditors, should, for the protection of the creditor, forbid the claimant from collecting his demand except through a receiver, who should hold the proceeds subject to be disposed of according to law under the order of the court, we are unable to say that such action would be inconsistent with section 3477. Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of the court appointing the receiver would be null and void, as between those who are parties to the cause and are before the court."

In the present case the question arises solely between the principal parties. They have placed in the hands of the court a fund, which, as between them, the court would have had a right to take into its custody even against the objection of the defendant. There can be no question, then, touching the jurisdiction and power of the court to make the decree in this cause.

Treating the question, therefore, as affecting only the plaintiffs and the executrix, are not the plaintiffs entitled to a lien upon the fund if they are entitled to anything for professional services in producing the fund? Upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor, they have a lien upon it to the extent of the compensation they are entitled to receive. *Mechem on Agency*, sec. 868; 4 *Cyc.*, 1005. For these reasons we do not feel embarrassed by section 3477 in dealing with the case as equity may require.

(3) The third objection is that plaintiffs are precluded from recovery by reason of inexcusable failure to carry the claim through to a final determination.

This raises a question of fact. The case was carried through its later stages by other counsel. Was this due to the fault of the plaintiffs, or to the action of the defendant and her decedent? The situation of the case after the final decision of the Secretary presented a problem of great perplexity. It is easy enough to say now,

222 after the decision of the court of last resort, that there should have been no doubt about the proper course to pursue. But in fairness to the plaintiffs we must not forget that not only had several officers of the Government, including the Secretary of the Treasury, taken a contrary view, but so did the law branch of this court and the Court of Appeals. It is not strange that attorneys should have questioned whether mandamus or some other remedy was the wise one to seek. If Congress had intended to leave the Secretary no discretion, counsel might not unreasonably assume that on the facts being called to the attention of Congress it would pass an act appropriating the specific amount found due by

the Auditor. This course may have seemed wiser to the plaintiffs than a petition for mandamus. If it did we are not sure that they should be condemned as incompetent. It is plain to us, however, from our consideration of the evidence that the failure of the plaintiffs to proceed in some manner to the collection of the claim was due to the attitude taken towards them by the decedent during the last months of his life, and by his executrix after his death. We think that if they had been fairly and frankly dealt with they were prepared to go on and would have gone on as their best judgment directed in the prosecution of the claim. The evidence is too detailed and fragmentary to make it worth while to piece it together here, and it would require more space than can be given to it. Moreover it is fully reviewed in the briefs of the counsel on both sides, and it will be enough to say that we incline strongly to the view of the plaintiffs' counsel upon this question as well as upon the next question, which is also mainly a question of fact, viz:

(4) Did the plaintiffs abandon and relinquish their right to prosecute, and their right to be compensated, under their contracts?

It would certainly require very considerable evidence to convince us that the plaintiffs, after the time and labor they had expended upon the claim, had intentionally abandoned it. Perplexing and embarrassing as the situation was, it certainly was not hopeless, from any point of view, and there is nothing in the evidence that convinces us that either of them ever intended to abandon, or ever gave the decedent or his executrix to understand that such was their intention. They had a right, as they were bound, to use their own best judgment and ability, and we are satisfied that if they had been fairly treated they would have continued in the management of the case. The attitude of the defendant and of her father towards them had been such as to make it difficult for them to proceed. They sought to have an interview with the decedent near the end of his life, when the course to be taken should be determined, and the interview was denied. In such circumstances it is not for the defendant to set up the proposition that they had abandoned their large interest in the claim. In her own course towards them she was apparently pursuing that which her father had mapped out for her, and ignored their relation to the claim, although she must have known in a general way what it was. There is no doubt that she knew they had been prosecuting the claim, and had been making advances on the strength of their relation to it. The contract between Parish and McGowan plainly contemplated that Parish him-

223 prosecution of the claim, although McGowan's right to compensation was not to be affected thereby. We think the plaintiffs had a right to understand that this course was being pursued and to stand upon their right to compensation according to the terms of the contract.

(5) We are thus brought to the fifth question, which concerns the amount which the plaintiffs are entitled to receive. It has been strongly insisted by the defendant that the plaintiffs rendered no

services of any substantial value; but we cannot adopt this view. Both McGowan and Brookshire had been at work upon the claim for years, and we think that Brookshire's contract as well as McGowan's is to be taken as referring to services already performed as well as those thereafter to be performed. The words, "for value received," in Brookshire's contract must refer, we think, to such prior services, even though we hold ourselves to the exact wording of the contract, which very likely was intended to read "heretofore" where it does read "hereafter." It is not necessary to find that the plaintiffs' services were in all respects the best that could have been rendered, but there is nothing to show that they were not the best they were capable of rendering, and their own deep interest in the claim would have prompted them to do their best. That their services were of real value is certain from the fact that they resulted in the passage of the act and in the finding by the Auditor, which were finally held to constitute a sufficient basis for a writ of mandamus. It is true that the act was ambiguous in some respects and left it a matter of contention whether a discretion was vested in the Secretary, but it is not for us to say upon this record that a more explicit act would have met with the approval of Congress. Congress was not prepared to appropriate a specific amount. It considered it necessary not only that a computation should be made but that there should be an ascertainment of the amount it would have cost Parish to have delivered the ice which was not actually delivered; and when this amount had been ascertained by the Auditor the court was able to hold that the amount to which Parish was entitled had been made certain. *Parish v. MacVeagh*, 214 U. S. 124.

It was perfectly competent for the parties to these contracts to stipulate in advance for the exact amount of the compensation to be paid and received, and that they did. The contract having been performed on the part of the plaintiffs as far as they were permitted to perform it, we see no reason why they should not receive the amount agreed upon. *Nutt v. Nutt*, 200 U. S. 12.

A decree will be entered accordingly.

WENDELL P. STAFFORD, *Justice*.

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Final Decree.

Filed October 19, 1911.

In the Supreme Court of the District of Columbia.

In Equity. No. 28561.

JONAS H. MCGOWAN AND ELIJAH BROOKSHIRE

VS.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, et al.

This cause coming on to be heard upon the pleadings and the interlocutory consent decree entered herein on the second day of June, in the year 1909, and the testimony, and having been argued by

counsel and duly considered by the Court, and it being made to appear to the Court that on the seventh day of June, in the year 1909, and pursuant to the requirements of said consent decree, there was deposited with the American Security and Trust Company of Washington, D. C., the sum of forty-one thousand dollars to the credit of this cause and subject to the further order of this Court and subject to the determination of this Court in this cause whether any amount, and if so what amount, became justly due the plaintiffs or either of them for professional services rendered by them or either of them for or in respect of the matters described in the bill of complaint, and that the said sum of forty-one thousand dollars with interest thereon at the rate of two per cent per annum from the seventh day of June, in the year nineteen hundred and nine, is now on deposit with said American Security and Trust Company to the credit of this cause and subject to the further order of this Court, under the terms of the aforesaid interlocutory consent decree;

And it appearing to the Court that after the institution of this suit and the entry of said consent decree the plaintiff, Jonas H. McGowan, died and that Josephine P. McGowan, the sole executrix of his last will and testament, was by the order of this Court entered on the second day of August in the year nineteen hundred and nine substituted as a party plaintiff in the place and stead of the said Jonas H. McGowan, deceased:

It is adjudged, ordered, and decreed, by the Court in equity sitting this 19th day of October in the year 1911, and the Court determines, that there is justly due to Josephine P. McGowan, executrix of the last will and testament of Jonas H. McGowan, deceased, for the professional services performed by the said Jonas H. McGowan and described in the bill of complaint the sum of eighteen thousand one hundred and thirty-five dollars and eighty-nine cents, with interest thereon at the rate of six per cent per annum from the seventh day of June in the year 1909, and to the said Elijah V. Brookshire the sum of eighteen thousand one hundred and thirty-five dollars and eighty-nine cents, with interest thereon at the rate of six per centum per annum from the seventh day of June in the year 1909, and

225 that the said Josephine P. McGowan, executrix as aforesaid, recover against the said Emily E. Parish, executrix of the last will and testament of Joseph W. Parish, deceased, the said sum of eighteen thousand one hundred and thirty-five dollars and eighty-nine cents, with interest as aforesaid, and that the said Elijah V. Brookshire recover against the said Emily E. Parish, executrix of the last will and testament of Joseph W. Parish, deceased, the said sum of eighteen thousand one hundred and thirty-five dollars and eighty-nine cents, with interest as aforesaid; and that out of the moneys so on deposit with it under the consent decree aforesaid there shall be paid by said American Security and Trust Company to the clerk of this Court the costs in this cause to be taxed by the Clerk of the Court, and after the payment of said costs the remainder of said moneys shall be applied by said American Security and Trust Company to the payment of the said sum of eighteen thousand one hundred and thirty-five dollars and eighty-nine cents, each, with interest thereon

as aforesaid, to the said Josephine P. McGowan, executrix, and the said Elijah C. Brookshire, or their attorneys of record, respectively; and after the payment of said costs and the said sums to the said Josephine P. McGowan, executrix, as aforesaid, and the said Elijah V. Brookshire, with interest as aforesaid, the remainder of said moneys, if any, shall be paid by said American Security and Trust Company to the defendant, Emily E. Parish, executrix, or her attorneys of record.

From the foregoing decree the defendant, Emily E. Parish, executrix, now, in open Court, appeals to the Court of Appeals of the District of Columbia; whereupon, it is hereby ordered that the said appellant may either give an appeal bond in this cause to be approved by the Court in the penal sum of one hundred dollars (\$100.00), or in lieu thereof, deposit with the clerk of the Court the cash sum of one hundred dollars (\$100.00) in this cause, as said appellant may elect, and that the same in either event shall operate as a supersedeas.

WENDELL P. STAFFORD, *Justice*.

Memorandum.

October 19, 1911. \$100. deposited by Leigh Robinson in lieu of Supersedeas Bond.

Assignments of Error.

Filed November 29, 1911.

The trial Court erred:

1. In holding as matter of law, that the following letter, produced before the examiner by the Surviving partner of McGowan, did not show the deliberate and decisive abandonment by complainants of the Parish Ice Claim; and erred as matter of fact in holding that the abandonment by plaintiffs, or their failure "to proceed in some manner to the collection of the claim was due to the attitude taken toward them by the decedent during the last months of his life and by his executrix after his death * * * that if they, (complainants) had been frankly and fairly dealt with they would have gone on": Since the proof is that after her father's death, the defendant never received a word, spoken, or written from complainants; never had occasion to utter a word of any kind to them; and never laid eyes on one of them prior to this suit; since the record fails to show a word of unkindness, or of unappreciation even, prior to the letter which follows, and in this letter only amicable language can be read from the client who had been abandoned.

(Letter.)

Committee on Claims.

HOUSE OF REPRESENTATIVES, U. S.,
WASHINGTON, D. C., Sept. 15, 1904.

Hon. J. H. McGowan.

My dear Sir and friend:

Your letter of 25th ult., received in due time and contents noted, which I answered best I could but have no answer thus far come to hand and will repeat in substance I wrote to wit: You will remember before you left Washington for your summer respite, you said substantially "that you had done your best to get Auditor's report in my case paid by the Secretary of the Treasury and failed etc. that you turned over to me the case to be managed in the future and do whatever I deemed best etc."

Sometime next Congress I propose to organize a practicable method and resurrect the claim from its unfortunate condition and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore I said that I would reimburse those who have advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit: "that you would be glad and well satisfied to get the money advanced me" returned. My past record as to compensation who had rendered me service you have not surely forgotten which was generous and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm, who is doing business here and *and* in New York.

Yours hastily,

J. W. PARISH,
217 A St. S. E."

2. In holding that "there is nothing in the evidence to convince us that either of them (complainants) ever intended to abandon, or ever gave the decedent, or his executrix, to understand that such was their intention."

3. In holding "The attitude of the defendant and of her father towards them had been such as to make it difficult for them to proceed".

227 4. In holding: "In such circumstances, it is not for the defendant to set up the proposition that they had abandoned their large interest in the claim".

5. In holding: "In her own course towards them (complainants) she was apparently pursuing that which her father had mapped out for her, and ignored their relation to the claim, although she must have known in a general way what it was."

6. In holding: "The contract between Parish and McGowan, plainly contemplated that Parish himself or others whom he might employ might assist in the prosecution of the claim, although Mc-

Gowan's right to compensation was not to be affected thereby. We think the plaintiffs had a right to understand that this course was being pursued and to stand upon their right to compensation according to the terms of their contract".

7. In holding: "Both McGowan and Brookshire had been at work upon the claim for years, and we think that Brookshire's contract as well as McGowan's is to be taken as referring to services already performed. The words 'for value received', in Brookshire's contract must refer, we think, to such prior services even though we hold ourselves to the exact wording of the contract, which very likely was intended to read 'heretofore' where it does read 'hereafter.'" Although as to McGowan, the averment under oath in the bill is that "pursuant to the employment above mentioned and the agreements hereinbefore set forth, the said complainants in cooperation and together diligently prosecuted the said claim": and not pursuant to any prior employment, or any prior agreement; although, as to Brookshire, his contract with Parish of January 1903, states the consideration to be for legal services "hereafter rendered and to be rendered by E. V. Brookshire," the word "hereafter" in the original being admitted to be in the handwriting of Brookshire, and notwithstanding when on cross-examination Brookshire is asked: "all of these alleged services, as you have detailed them rendered before Committees of Congress and the Executive Departments of the Government, were all rendered under and in pursuance of your contract of employment with Mr. J. W. Parish, were they not?" he answered "and my contract of employment with Mr. McGowan, i. e. of December 3d, 1902.

8. In failing to hold, that the failure of complainants to take any step, advise any step, or prepare any remedy, during two thirds of the time, when any proceeding at law could be taken, did not of itself operate as an abandonment.

9. In holding that the consent decree filed ten days after the filing of the bill, and consenting that a portion of the fund, subject to the temporary restraining order, should be held by the American Security and Trust Company, "subject to the determination by this Court in this case, whether any amount, and if so, what amount, is justly due the complainants or either of them, for and in respect of the matters described in the bill of complaint", ipso facto operated as a waiver by the defendant, as to any and every question touching the illegality of the contracts sued on.

10. In holding that in the case of contracts prohibited by 228 law, it could be in the power of parties or of Courts to waive the violated law.

11. In holding that an attorney's lien could be fastened upon a judgment at law, by attorneys, (who never appeared or assisted in the action), on the claim of services rendered exclusively before Congress and the Executive Departments.

12. In holding that what would be in effect an action on a Quantum Meruit could be enforced by what is in fact a suit in equity.

13. In holding, that interest could be recovered from the time of

filing suit, on what as finally presented is a claim for unliquidated damages.

HOLMES CONRAD,
LEIGH ROBINSON,
For Defendant.

Defendants' Designation of Record on Appeal.

Filed October 25, 1911.

* * * * *

The Clerk will prepare record herein for the Court of Appeals, and include the following:

1. The Bill of Complainant, filed May 22nd, 1909, (omitting Parish record in U. S. Supreme Court filed as Exhibit to the bill with leave to produce same at hearing).

2. The order of June 2nd, 1909, dismissing the restraining order as to Franklin MacVeagh, Secretary, and Charles H. Treat, Treasurer, and dissolving the restraining order as to Emily E. Parish, provided that in respect of the sum of \$41,000 she be directed to make and execute a proper power of attorney empowering Corcoran Thom to receive and hold the same in the American Security and Trust Company to the credit of the cause and subject to the further order of the Court, and the determination of the Court, "whether any amount and, if so, what amount is justly due the complainants."

3. Memorandum of suggestion of death of Jonas H. McGowan.

4. Appearance and adoption of bill by Josephine McGowan filed August 2nd, 1909.

5. Answer of Defendant- filed September 29th, 1909.

6. Replication.

7. Complainants' Depositions and Exhibits thereto. (Omitting Exhibit two (2) Potbury's opinion on Mandamus, p. 22 with leave to refer to same in appellate court, Exhibit five (5) page 43, agreement of Parish and McGowan of August 4, 1900, and Exhibit six (6) page 43, the assignment of McGowan to Brookshire, both being already in the bill; but including Exhibit one (1) the agreement of Brookshire with McGowan being incorrectly stated in the bill). With the exception of Exhibit two (2), and of Exhibits five (5) and six (6), for the reason that these two Exhibits will be printed with the bill, include all of Complainants' Exhibits, together with the power of attorney from J. W. Parish to McGowan October 25, 1903; the certified copy of argument of McGowan before the Treasury Department, and statement by John B. Gilfillian of the settlement had with Parish, and of the sums remaining to be settled.

Defendants' depositions and Exhibits.

(8) Insert circular letter (Exhibit 1) where it appears in proof—page 112.

(9) Omit the complete copy of Exhibit 13 and substitute "Memorandum of Agreement made this 1st day of November A. D. 1905,

between Emily E. Parish of Washington, District of Columbia, sole executrix of the Will of Joseph W. Parish, deceased, duly appointed by the Supreme Court of the District of Columbia, April 7th, 1905, party of the first part, and Holmes Conrad, Attorney at Law, of the same place, party of the second part"; and in respect to Exhibit five (5) Deed of Sept. 16, 1896, from Emily to Grant Parish, simply copy what is on p. 293 relating to Exhibit five (5). In respect to Exhibit six (6), for the complete copy thereof, substitute Memorandum of Agreement by Grant Parish of September 16, 1896, recorded the same day, in consideration of the conveyance from his sister of the same date, that his said sister may occupy the premises as her home during her natural life and "that he will support his said sister in a good and respectable manner, such as her own standing in the community demands."

In respect to Exhibit seven (7) simply copy what is in the record (p. 296) as to deed of March 11, 1898 from Grant Parish to Emily E. Parish.

Include in full Exhibits eleven (11) and twelve (12), being Reports of the 55th and 56th Congresses.

(11) Include First and Final account of Emily E. Parish, Executrix.

(12) Opinion of the Court filed August 30, 1909.

(13) Final Decree filed October 19, 1911.

(14) Assignments of error.

(15) This designation.

HOLMES CONRAD,
LEIGH ROBINSON,
Solicitors for Defendants.

Service of copy of the above acknowledged this 25th day of October, 1911.

NATH'L WILSON,
Per V. H.

Oct. 25, 1911.

J. J. DARLINGTON,
Per LINTON.

230 COMPLAINANTS' EXHIBIT No. 1 TO ORIGINAL BILL.

Filed May 22, 1909.

Petition.

Filed May 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. 48507.

THE UNITED STATES ex Rel. EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

v.

LESLIE M. SHAW, Secretary of the United States Treasury.

The relator, Emily E. Parish, Executrix of the last will and testament of Joseph W. Parish, deceased, says:

1. That she is a citizen of the United States and a resident of the District of Columbia; that the defendant is a citizen of the United States and at present a resident of said District. That on the 7th day of April, A. D. 1905, by virtue of the decree of the Supreme Court of the District of Columbia, sitting as a Probate Court, she duly qualified as Executrix of the last will and testament of her father, Joseph W. Parish, deceased. The certificate of the Register of Wills of this District, showing her said appointment and qualification, marked "Relator's Exhibit No. 1," is filed herewith and made part of this petition.

2. That under and by virtue of an act of Congress approved May 31, 1872, the said J. W. Parish brought an action in the Court of Claims to enforce the rights accruing to him under a contract made with the United States authorities on March 5, 1863, by said Parish, as J. W. Parish & Co. By said Contract the said Parish agreed to deliver at Memphis, Nashville, St. Louis, and Cairo, for the use of the United States Medical Department, the whole amount of ice required to be consumed during the remainder of the year 1863. The ice was to be in quality, "A. No. 1," was to be subject to inspection; rates of payment for ice delivered at Nashville per ton, \$25.00; at Cairo and Memphis, \$20.00; at St. Louis, \$15.00; three working days were allowed for discharging each cargo at either of the points mentioned. A copy of said original agreement, marked "Relator's Exhibit No. 2," is filed herewith, as part of this petition. On March 25, 1863, Joseph B. Brown, by instruction of Assistant Surgeon-General Wood, issued the following order:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
SAINT LOUIS, MISSOURI, March 25, 1863.

Messrs. J. W. Parish & Co.

231 GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz:

At St. Louis.....	5,000 tons
At Cairo.....	5,000 tons
At Memphis.....	10,000 tons
At Nashville.....	10,000 tons

making the total of 30,000 which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for use of the sick of the armies in the field and should be furnished without delay.

By order of the Assistant Surgeon-General,
Very respectfully, your ob't servant,

JOSEPH B. BROWN,
Surgeon, United States Army.

The said Parish immediately made his arrangements to execute the foregoing order "without delay."

3. Mr. Horace S. Cummings, an officer of the Executive Department to which Parish originally applied for redress, in a statement filed with the testimony taken in the Court of Claims, says: "From a personal inquiry, made at the Surgeon-General's office of Mr. Ramsay, Chief Clerk, who was at the time conversant with the transaction, I learn that the meltage of Mr. Parish's ice was very small as compared with other dealers or contractors, as it generally averages $\frac{1}{3}$ to $\frac{1}{4}$, while Mr. Parish's average- only between $\frac{1}{7}$ and $\frac{1}{8}$, of the amount delivered. It also appears that the price received per ton by Mr. Parish for ice in the Mississippi Valley was about \$20, while the records of the Surgeon-General's office show that during the same period the Medical Department were obliged frequently to buy of private parties in the same section of the country and they paid on the average of more than \$60 per ton."

4. It therefore appears that said Parish was effectually performing his part of said contract with the Medical Department, when, on March 31, 1863, was sent the following:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
ST. LOUIS, MISSOURI, March 31, 1863.

To J. W. Parish & Co. (care of C. H. Wicker & Co.), Chicago, Ill.:

I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

R. C. WOOD,
Assistant Surgeon-General."

5. In the trial in the Court of Claims, that Court finds in the 5th finding of fact: "It does not appear that this dispatch (viz of March

31, 1863) ever reached the claimant- or either of them. The claimant Parish did have knowledge of this notice by oral information from the Assistant Surgeon-General at St. Louis, on the 2nd day of April following."

The 6th finding of the Court of Claims is as follows: "Prior to the delivery to the said Parish of Joseph B. Brown's letter of
232 March 25, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and, after delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2nd day of April, 1863, apprised of the aforesaid order of Surgeon-General Hammond, of March 31, he had purchased, or contracted for the purchase of 23,000 tons of ice."

The 7th finding is: "The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At St. Louis.....	4,174
At Cairo.....	1,388
At Memphis.....	6,456
At Nashville.....	750
Total	12,768

For this contract the said Parish has been paid the contract prices."

Finding VIII. "Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2nd of April, 1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi was such that, with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to St. Louis and the other places at which the said Parish was required by said contract to furnish said ice; but the said Parish did not have steamboats and barges at said lake in that month to transport the ice which he purchased there, and after that month the water in said river became and continued so low that the said ice could not be so transported southward and the same melted and was lost to the said Parish."

Finding IX. "The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March, 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

Finding XI. "The notice of 25th of March, 1863, to the claimants, from the Assistant Surgeon-General's office at St. Louis set out in finding V, and which was suspended by order of the Surgeon-General, remained so suspended until the expiration of the time named in it for the duration of the contract of the 5th of March, 1863."

6. And now this relator says, that the majority of the Court of Claims, speaking through Drake C. J., held: "In our judgment, the

letter of Assistant Surgeon-General Wood was no part of the contract, and imposed no liability on the Government, and, as the claimants' case rests upon that, their petition must be dismissed." (12 Court of Claims p. 620.)

In a dissenting opinion of Nott J. (Peck J. concurring), which was afterwards in substance sustained by the U. S. Supreme Court, it is stated: "In the army when a superior officer amends, modifies, or changes the order of his inferior it immediately becomes
233 his order. If the Assistant Surgeon-General had no authority to order the claimant to deliver this ice "without delay," as he did, the Surgeon-General, if he did anything, should have revoked the order and notified the contractor. He could not adopt it so as to keep it in suspense and at the same time declare that it never had vitality. To suspend it was to give it vitality if it had none, and to that extent to ratify it. * * * The fact that this contractor's commodity was of the most perishable nature was a fact known to him when he agreed to deliver the amount of ice required to be consumed.

* * * That this ice proved a total loss to the contractor and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial. A large quantity of ice is not a commodity that can be handled and thrown upon the market in warm weather, nor sent forward and stored to await demand. * * * The order to deliver caused him to purchase it; the suspension of the order occasioned its loss." (Id. pp. 622, 623, 624.)

7. The case went up to the Supreme Court of the United States, and that tribunal, in an opinion from which there was no dissent, concurred with the dissenting opinion in the Court of Claims. Miller J., speaking for the Court, said: "We apprehend, if the case were reversed and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming there would be no question of the validity of the notice of the Assistant Surgeon-General. * * * The order of the 25th of March, made within twenty days after the contract was signed was an unequivocal demand, under that instrument, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. No one familiar with the climate and the sources of supply could doubt that to enable him to fulfill this demand made at that season, required promptitude and diligence in securing the ice. * * * They were, therefore, under an imperative necessity to prepare to fulfill this requirement."

8. The Supreme Court did indeed adjudge, that "to hold the Government to the contract price for all those amounts, they (Parish & Co.) should have delivered, or tendered, or offered to deliver, and demanded payment." But they also said: "as the Government left the demand suspended so that while claimants were compelled to purchase under the original orders, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they

paid for the ice which was lost, and what expense they were at in making the purchase and in keeping it until it was lost." The Court therefore held, that "Claimants are entitled to the expenses and losses incident to the preparation to meet the demand of the notice served on them. The cost of the ice purchased at Lake Pepin and lost, the expense bestowed upon its care, and the time and expense of making that purchase, and any sum actually lost in regard to the other 7,232 tons of ice purchased to enable them to meet that requirement, must form the measure of the plaintiffs' recovery. Because these are not found by the Court of Claims, the judgment of the court will be reversed, and the case remanded, that their damages may be ascertained and judgment entered accordingly." (Parish v. U. S., 100 U. S. 504-6.)

As will be seen from the report of the case, the opinion of Drake C. J., that said Parish was not justified in treating the order of the Assistant Surgeon-General as valid, was so untenable that it was abandoned, for as to this it is stated by Miller J.: "In the argument of the case before us the counsel for the Government abandons this view of the matter and we think properly."

9. Your relator says that whatever may have been the showing of the record in the U. S. Supreme Court the record in the Court of Claims left no doubt as to the total loss of 17,232 tons of ice. It showed the purchase by Parish of 10,000 tons at Lake Pepin from Wicker, and 6,000 more at Lake Pepin from Beasley. The 6,000 tons yielded to the same natural causes which put an end to the 10,000. The loss of the remaining 1,232 tons is accounted for by the testimony of Henne Stevens, Medical Purveyor at Cairo from October 24, 1862, to the latter part of May, 1863, and from that time until August, 1865, at Memphis. It is unnecessary to recite the evidence on this subject, since the fact of such total loss was ascertained by a reference to the War Department, and in effect adjudicated by legislative act, to be hereinafter more particularly mentioned.

10. The Court of Claims, in response to the mandate of the U. S. Supreme Court held, that it could not, under its rules, reopen the case for additional evidence, but on that before it made an award in favor of the claimant in the sum of \$10,444.91. (16 Court of Claims 642.) The claimant then asked at the hands of Congress the means of satisfying so much of this claim, as the Court of Last Report had adjudicated to be his unquestionable right. His claim was referred by the House Committee to the War Department, for report. The Surgeon-General found that the whole amount of undelivered ice, viz., 17,232 tons was lost to said Parish, and ascertained the cost thereof.

11. This relator therefore shows, that for 12,768 tons of ice furnished to the Government the petitioner had been paid the contract price. There had been left on his hands undelivered 17,232 tons of ice. The War Department reported back to Congress that, under the evidence taken before the Court of Claims and the additional evidence before it, Parish was entitled to be reimbursed on account of the ice not delivered, the sum of \$58,341.85, in addition

to the award of the Court of Claims, \$10,444.91, to compensate him for the amount he had lost because of the non delivery of the 17,232 tons of ice. On the coming in of this report, by act of Congress of February 20, 1886, it was enacted: "That the Secretary of the Treasury be and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of \$58,341.85, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the
235 Government of the United States, which were not afterward called for, or taken by the Government, but were wholly lost to said Parish." (24 Stat. 653-4.) There can be no gainsaying that this act is a legislative declaration, as conclusive as the judgment of a Court, fixing the fact of the purchase by said Parish, for the use and at the request of the Government, of 17,232 tons which were not afterwards called for, but were "wholly lost," and further determining what was honestly due him on this account, and ordering the same to be paid.

12. This relator further shows, that when the payment last mentioned was made the said Parish had received the contract price on the ice actually delivered, viz. 12,768 tons; and in addition what he had actually spent and actually lost on account of the balance, viz. 17,232 tons of ice. That which was paid to him, after February 20, 1886, was only that which the U. S. Supreme Court adjudicated should have been paid to him on January 1, 1864. That is to say, the said Parish had not only lost the interest on this large sum of money for more than two decades, but had been forced to meet the expense of litigating his claim; and been subjected to the labors, anxieties, and trials of prosecuting the same.

13. So much had been placed beyond the field of discussion, when evidently under the conviction that full justice had not been done, on the 17th of February, 1903, Congress passed a further act as follows: "That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a contract made by J. W. Parish & Co. with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which act bears date March 5, 1863, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army, the whole amount of ice to be consumed at Memphis and Nashville, Tennessee; St. Louis, Missouri, and Cairo, Illinois; during the remainder of said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company, if the said contract had been carried out in full without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States v. Behan, 110 U. S. 338, and in accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish & Co. un-

der said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Co., or to said J. W. Parish, whether in pursuance of judgments of the Court, or direct appropriation by Congress or otherwise, stating what balance if any, is due under the rule and evidence presented herein and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated. (32 Stat. 1612.)

14. Your relator submits, that the foregoing act is a plain, un-ambiguous direction to the Secretary of the Treasury to pay
236 the claimant an amount which would be rendered certain upon the statement of the account by the proper Government accountant. If a reasonable doubt could exist as to the plain meaning of the act the able and learned reports of the Committees of the Senate and the House should efface it completely. The Senate Report states: "It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it then the Court admits that his measure of damages would have been the contract price of the ice or the profits he might have made if he had done so * * * In the case of *United States v. Behan* (110 U. S. 338), which was decided four years later than the Parish case and which is now the rule, the Court laid down the rule as follows: "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance less the value of material on hand; Secondly, the profits that he would realize by performing the whole contract. The second item profits cannot always be recovered. They may be too remote and speculative in their character and, therefore, incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, they are "the direct and immediate fruits of the contract," they are free from this objection, they are then "part and parcel" of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they cannot be legally proved the party is confined to his loss of actual outlay and expenses." (Also See *U. S. v. Speed et al.* 8 Wall. 77.) In the *Masterson v. Brooklyn* case cited by the Supreme Court in the above quotation, the plaintiff contracted with the Corporation of Brooklyn to furnish all the Marble necessary for the erection of a certain public building, after part performance defendants refused to complete the contract.

Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which the defendants agreed to pay. The reasons for the application of this more equitable rule in the Behan case were not nearly so strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice at the various places named. The profits, therefore, were readily and easily ascertainable. In fact that was the theory of the plaintiff in making his case before the Court of Claims and the record of that Court shows that the proofs on the point were explicit, bringing

237 the case within the principles laid down in Behan v. U. S.

In a word, it is perfectly clear that the Supreme Court overlooked one of the most important findings of fact in the Parish case * * * Congress having therefore given only partial justice in this case there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates." The House Committee adopts this report and adds to it citation after citation confirmatory of Masterson v. Mayor 7 Hill 61; among others, authority to show "that a tender is not necessary where the party to whom it would be made has previously notified the party by whom it would be made that the tender would not be accepted, or the person to whom it might be made has placed himself in such a position as to make it clearly appear that if made it would be refused" * * * The error of the Supreme Court was due, we think to overlooking the 9th finding of fact of the Court of Claims in Mr. Parish's case. In fact we cannot reconcile the decision of the Supreme Court with any other opinion * * * Your Committee, therefore, without further comment, are clearly of the opinion that the rule of damages announced in Masterson & Smith v. The Mayor of Brooklyn (7 Hill 61, 69) followed and approved in the Behan case, supra, is the true measure of damages clearly applicable to claimant's case." This relator is advised that where the time for delivery is to be fixed by the buyer, the seller cannot be put in default until notified of the time when to deliver. A copy of said Act of February 17, 1903, together with the reports of the Committees of the Senate and the House, marked "Relator's Exhibit No. 3," is filed herewith and made part of this petition.

15. Your relator further says that whether or not the Committees of the two Houses of Congress were right in their confident assumption that the 9th finding of the Court of Claims was not brought to the attention of the U. S. Supreme Court, it is certain that the findings of the Court of Claims did not specify evidence in the record tending to show, and indeed conclusively establishing that every requirement of the rule as to tender had been complied with. In the deposition of Robert T. Cramer, Acting Medical Purveyor and Disbursing Officer in the Medical Department of the Armory at St. Louis, Missouri, between the 25th of March, 1863, and the 2nd day of April, 1863, the deponent states: "I remember a contract for furnishing ice to the Medical Department of the Armory, I think 30,000 tons * * * The Contractor was J. W. Parish & Co. * * * I think the contract had been made in Washington, but the apportionment had been made, I think, at St.

Louis. * * * It was on the 25th of March that I first saw him (Parish) and on that evening he left for Chicago." Q. "How soon after that did you see him again, as you now remember?" A. "It was during the early part of the next week. * * * He said he was prepared to furnish the ice." Cross Question—"You were not the proper officer to whom he should report his readiness to supply the 30,000 tons of ice, were you?" A. "I was the Chief Medical Disbursing Officer of the West; in addition to my having charge of the Medical Purveying Depot. I was the Medical Disbursing officer; I had possession of all the funds." Q. "Do you know whether Mr. Parish bought any ice after the first of April?" A. "I don't think he did, because he had told me, when he returned from Chicago, that he had secured all the ice necessary to meet the contract." * * * Q. "Has your recollection as to some of the matters in this case been refreshed by any statements or suggestion of Mr. Parish in any of his letters?" A. "No, Sir. My memory has been refreshed by the correspondence I had with the Attorney-General, when I was requested to make replies to their communications; it was then that I hunted up everything that I had bearing upon the subject." Further direct question. "What quantity of ice did Mr. Parish state to you he was prepared to supply?" A. "He said, 'I have made all my contracts to furnish the 30,000,' and he wanted me, if I was in communication with my associates, to urge upon them the importance of securing it as soon as possible; that he was prepared to furnish the whole apportionment, 30,000 tons," (Rec. p. 193). The testimony of said witness is not contradicted nor impeached. It is, therefore, established. It sustains the 9th finding that said Parish was prepared and willing to deliver the whole 30,000 tons of ice in conformity with "the terms of said letter of March 25th, 1863, of which the defendants had notice, but they would not, nor did, receive more than 12,768 tons aforesaid." Your relator once more says that the undisputed proof and said finding in accordance therewith demonstrates that full and ample tender was made by said Parish to the Medical Department, and notwithstanding such tender, as shown by the 11th finding, the suspending order of March 31, 1903, remained so suspended until the expiration of the time named for the duration of the contract. As is reiterated in the reports of the two Committees, it was to give the said Parish, the full benefit of this that the act of February 17, 1903, was passed.

16. This relator further says, that, as stated in the Report of the Senate Committee, made a part of the Report of the House Committee, the profits legally due under the contract were readily and easily ascertainable; that the theory on which the plaintiff submitted his case in the Court of Claims, required just this proof, and that, "the record of that Court shows that the proofs on that point were explicit." The testimony of James L. Huse, shows the rate of transportation of ice during the Spring of 1863—by barges

From Lake Pepin to St. Louis.....	\$5.00 per ton
" " " " Cairo.....	6.00 " "
" " " " Nashville.....	9.00 " "
From Cairo to Memphis.....	2.00 " "

As to rate by rail from Chicago to St. Louis, Cairo or Alton, the witness says: "From \$5 to \$6 would, I think, cover all the points."

R. A. Scanlon, Government Superintendent of Transportation, from early in 1863 to the latter part of 1864, says, "the rate charged for the transportation of ice from Chicago to Cairo by rail, in the Spring and Summer of 1863, was \$5 per ton." Isaac D. Harmon

says they were the same to St. Louis. Peter Conrad says the rates from Lake Pepin to St. Louis were from \$5 to \$6 per ton; from Lake Pepin through to Memphis would make \$2 per ton difference, and through to Nashville \$2.50 to \$3. Q.

"Did you actually move ice between any two of the points named during the Spring of 1863?" A. "Yes, Sir." Q. "Between what two points did you move ice that season?" A. "From Lake Pepin to Memphis and from St. Louis to Nashville." Louis A. Goodell deposed that ice could be brought from Lake to St. Louis in April and May, 1863, for about \$5 per ton. * * * Q. "Would you swear that on the average of the season it could not be bought for less than \$5, positively?" A. "Yes, Sir." The foregoing testimony received no word of contradiction from the defendant.

"The evidence collected by the Court of Claims" shows what would have been the price of transporting the non-delivered ice, with such certainty, that counsel for the Government in that Court, not only could not disprove but could not deny it, and in effect admitted what they were unable to dispute. This branch of the claimant's case was, therefore, conclusively established.

17. This relator further says that the Record in the Court of Claims shows the transportation of the ice from Lake Pepin and elsewhere to have been perfectly practicable. Louis A. Goodell was asked on cross examination, "Do steamers run on the Mississippi all Summer as far up as Lake Pepin?" A. "Yes, Sir, low water boats." Q. "Explain what you mean by that." A. "I mean a steam wheel boat that will draw about eighteen to twenty inches of water and can carry 100 or 150 tons and tow barges; I think they generally run the season through." The deponent had six barges at Lake Pepin. Q. "Did those all come down together?" A. "Yes, sir."

Q. "And would bring about how much?" A. "Well, the first trips I fetched down about 2,500 to 2,800 tons." * * * Q. "Can you state the latest trips that you came down the river?" A. "I think it was in July." James L. Huse states: "We were moving ice that year to all those points except Nashville and we transported ice to Nashville for several years succeeding that year." Q. "Did you during that season move any quantity of ice from Lake Pepin to either of the points you have named?" A. "We moved several thousand tons from Lake Pepin to St. Louis and points below." Q. 15. "Did you have any ice brought down from Lake Pepin by any other parties that season?" A. "We did a little that Summer." Isaac D. Harmon is asked: "State whether or not the claimants in his case had made preparations for transporting ice on the Mississippi river." A. "They had, so far as I was concerned. They had bought barges and employed two boats. I remember

about 2,000 tons on one barge they had purchased." Joel H. Decker, being asked his opinion as to the ability and readiness of J. W. Parish & Co. to fulfill their contract, according to its terms, answered, "I know that they could have fulfilled it according to the terms of their contract. They were prepared and ready to fulfill it." A letter was proved and admitted in evidence, written at St.

Louis, March 28, 1863, from Parish to C. A. Stevens & Co., in which the former stated: "I am getting boats and barges for Pepin Lake; I will have a fleet ready to start in ten days. Captain Davidson said he would take 3,000 tons from Lake Pepin to St. Louis for \$5 per ton; I pay insurance by taking the usual risk. To get the ice bought of you out soon, I will give that amount and you can have him commence on your ice as soon as you can, as I would like to have it all aboard by the 10th."

18. This relator therefore says it is manifest that Congress did not seek to compel impossibilities in directing to be ascertained, from the evidence in the case collected by the U. S. Court of Claims, the full amount due to said J. W. Parish. In point of fact, the statement of account so directed to be made was referred to the proper officer of the Government and of the Treasury, viz. to the Auditor for the War Department. Responding to the plain meaning of the act of February 17, 1903, the Auditor states the account as follows:

5,000 tons of ice at St. Louis, Mo.,	\$5 per ton...	\$80,000
5,000 " " " " Cairo, Ill.,	\$20 " " ...	100,000
10,000 " " " " Memphis, Tenn.,	\$20 " " ...	200,000
10,000 " " " " Nashville, Tenn.,	\$25 " " ...	250,000
		<hr/>
From which deduct Payment by Medical		\$630,000
Department	\$129,783.33	
Settlements by 2nd Comptroller's office..	171,072.69	
Award by Court of Claims.....	10,444.91	
Am't saved by non-delivered ice.....	137,385.12	
		<hr/>
		448,641.05
Leaving balance due.....		<hr/>
		\$181,358.95

19. Your relator says that the foregoing account is so clear in itself, as to call for no aid of argument. Nevertheless, the same is fortified by the conclusions in writing of the Law Board of the office of the Auditor of the War Department, from which the following is extracted: "Said Committees, of Congress, were evidently satisfied with the evidence as to Mr. Parish's ability to have fulfilled his contract and as to the loss of the ice. Congress itself was satisfied that Mr. Parish had made out a prima facie case, and was apparently entitled to the full amount of the profits prevented as well as of the losses sustained by the suspension of his contract, that is to an equivalent to the gains or profits he would have realized from the fulfillment of his contract: This statement is evidenced

by the fact that Congress passed the act of February 17, 1903, directing the Secretary of the Treasury to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., if the said contract had been carried out in full, without change or default made by either of the parties thereto; in other words, as if Parish had delivered the whole amount of ice
241 contracted for, and the government had received it, thus eliminating all questions of fact other than the cost of delivery of the ice."

Further it is said: "If it should be deemed expedient or necessary to carry the investigation as to the claim under consideration farther than is required by the act of February 17, 1903, which authorizes and directs the Secretary of the Treasury to make full and complete examination into said claim, and to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., if the contract had been carried out in full, and if the evidence in the case collected by the Court of Claims should be examined to ascertain from that source, first, whether or not the contractor had purchased sufficient ice to meet his obligations under his contract; second, whether or not the ice left on his hands had, in consequence of the refusal to receive it, been lost to him, it would be found that all these points are fairly well sustained in the affirmative by the testimony. It would appear, first, that the contractor, purchased considerably more ice than the required 30,000 tons, apparently having regard to unavoidable meltage before delivery; second, that the Court of Claims was justified in making its 9th finding of fact to the effect that Mr. Parish was prepared and willing to deliver the 30,000 tons of ice contracted for in conformity with the conditions of the letter of March 25, 1863, and that he tendered the whole 30,000 tons, but that the Government would not and did not receive more than 12,678 tons; and third, that the 8th finding of fact as to meltage and loss of ice at Lake Pepin, together with the declaration contained in the act of Congress approved February 20, 1886, (24 Stat. L. 653) that all the ice not called for, "was wholly lost to said Parish" are based on sworn testimony. Therefore, in conclusion it is stated by said Law Board "that under the act of February 17, 1903, there is not a single question of fact to be determined, other than the amount saved by the contractor by the non-delivered portion of the ice, the calculation of the value of the ice contracted for, at the contract prices, and the deduction therefrom of all payments already made to the contractor and claimant, and also of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice:" but further, "that the sufficiency of the evidence to prove the purchase of a single pound of the undelivered ice, between the 25th of March, 1863, and the 2nd day of April, 1863, by Joseph W. Parish & Co., or the loss of the same after the 31st day of March, 1863, is immaterial, in view of the provisions of the act of February 17, 1903." Hence it followed, "that after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition under the rule laid down for the measure of damages in the Behan case."

20. Your relator further shows that the said Auditor for the War Department sent to the said Joseph W. Parish, a letter bearing date August 11, 1903, as follows:

242 To Joseph W. Parish, care of Attorney J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due under act of Congress approved February 17, 1903, (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled as shown in the following statement and settlement certificate No. 23,729, transmitted to the Secretary of the Treasury for payment:

Amount claimed.	Amount disallowed.	Amount allowed.
		\$181,358.95

A copy of this letter marked "Relator's Exhibit No. 4," is filed herewith as part of this petition.

21. And now this relator says that every condition precedent to payment to said J. W. Parish, in accordance with said act of February 17, 1903, had been satisfied by the examination and settlement made on August 11, 1903, by the Auditor for the War Department; that thereby the exact sum due said claimant had been fixed; that the duty imposed by said act on the Secretary of the Treasury was not an official duty, in the sense in which these words are accustomed to be used, but the performance of a particular duty imposed by special act, in order to secure justice to a private individual; that the examination and settlement of the account in question by the Auditor for the War Department, as the proper hand for the Secretary for this purpose, was the rendition of the justice and the performance of the duty contemplated by the act, and left nothing for judgment to determine, or for discretion to restrain or qualify; that what was not certain at the time of the enactment of February 17, 1903, was perceived to be capable of being rendered certain, and by said statement and account of August 11, 1903, had been rendered certain; that what would have been due said J. W. Parish, "if the said contract had been carried out in full, without change or default made by either of the parties thereto," was determined by the letter of the contract; that the determination of the "balance alleged to be due him by virtue of a contract made by J. W. Parish with Henry Johnson, a Medical Storekeeper, acting on behalf of the United States," called for the deduction from the amount due under said contract, of so much of the cost of transportation as had not been incurred and that, as stated by the Committee of both Houses: "The Record of the Court of Claims shows that the proofs on the point were explicit." The Auditor, therefore, proceeded upon proofs satisfactory to the Congress which passed the law and which that body directed should guide and govern the statement of account. From the result thus derived, the act directs to be subtracted "all payments which have been made to said Joseph Parish and Company, or to said Joseph W. Parish, whether in pur-

suance of judgments of the Court, or direct appropriation by Congress, or otherwise, stating the balance if any." There can be no doubt that this was honestly done by the Auditor, and the balance correctly stated. What was left to be done by the defendant was a purely ministerial act in obedience to and in execution of the clearly expressed will of the law making power, so that the said act of February 17, 1903, from and after the report or statement of account by said Auditor for the War Department became and was mandatory upon the defendant.

22. And now this relator shows, that, although every *perquisite* had been fully complied with for the payment of such balance due said Parish, for which the said act of February 17, 1903, expressly appropriates sufficient money, "out of any money in the Treasury, not otherwise appropriated," nevertheless, the defendant, the said Leslie M. Shaw, Secretary of the Treasury, on the 31st day of May, 1904, declined and refused to pay said Joseph W. Parish the balance ascertained to be due by the Auditor for the War Department, or any balance or any sum whatever, and on the day aforesaid stated in express and positive terms that if said Parish was to be rewarded in any sum in excess of what had already been paid him, "Congress must fix the amount by specific appropriation." That is to say, the said Secretary positively refused to pay the balance found by the said Auditor to be due the said Parish or any part thereof.

Wherefore, since your relator has no remedy, save by this proceeding, she asks: That process may issue requiring the defendant, the said Secretary of the Treasury, to appear and answer this petition: That the writ of Mandamus may issue to said defendant requiring him to issue a draft in favor of this plaintiff for the sum of \$181,358.95, so found due as aforesaid, by the Auditor for the War Department, and that a rule, on said defendant may be granted, requiring him to show cause why such writ should not be granted, as aforesaid.

EMILY E. PARISH,

Executrix of Joseph W. Parish, Dec'd.

I do solemnly swear that I have read the petition by me subscribed, and know the contents thereof, and that the facts therein stated, upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

EMILY E. PARISH.

Subscribed and sworn to before me this First day of May 1906.

[SEAL.]

HENRY E. TRIPP,

Notary Public, D. C.

RELATOR'S EXHIBIT No. 3.

Filed May 2, 1906.

(Private—No. 469.)

An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a contract made by J. W. Parish and Company with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which contract bears date March fifth, eighteen hundred and sixty-three, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; Saint Louis, Missouri, and Cairo, Illinois, during the remainder of the said year eighteen hundred and sixty-three; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (One hundred and tenth United States Reports, three hundred and thirty-eight), and with accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish and Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated.

Approved, February 17, 1903.

RELATOR'S EXHIBIT No. 4.

Filed May 2, 1906.

Notice of Allowance of Claim.

Treasury Department, Office of Auditor for the War Department.

Claim No. 143,880, File No. 58743.

WASHINGTON, D. C., August 11, 1903.

To Joseph W. Parish, care of Attorney J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due you under Act of Congress app'd Feb. 17, 1903 (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled, as shown in the following statement and settlement certificate No. 23729, transmitted to the Secretary of the Treasury for payment:

245	Amount claimed.	Amount disallowed.	Amount allowed.
			\$181,358.95

Respectfully,

Copy.

F. E. RITTMAN, Auditor,

By W. A. R.

"Any person accepting payment under settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted * * * Any person whose accounts may have been settled by an Auditor of the Treasury Department * * * may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive."—Section 8, Act July 31, 1894.

Answer of Respondent.

Filed June 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48507.

UNITED STATES ex Rel. EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

vs.

LESLIE M. SHAW, Secretary of Treasury.

Answer of the respondent, Leslie M. Shaw, Secretary of the Treasury, to the rule to show cause and to the petition of the relator filed herein.

1. The defendant admits the averments of paragraph one. But defendant avers that the rights of said Joseph W. Parish under

the Act of Congress of February 17, 1903, in said petition referred to, if any such rights existed, were mere personal rights of the said Joseph W. Parish and were not property which could pass under his will, or to his personal representatives.

2. Defendant admits the averments of paragraph two.

3. Defendant admits that the statement was made by Horace S. Cummings as set forth in paragraph three, but says that the same is immaterial to the issues involved herein.

4. Defendant admits the sending of the letter copied in paragraph four, but denies that it appears that said Parish was effectually performing his part of the contract when the said letter was sent.

5. Defendant admits the averments of the fifth paragraph, but says that the findings of the Court of Claims are absolutely immaterial to any issue involved herein, as the Act of Congress herein-after referred to, and under which your defendant acted, provides that the said determination of your defendant shall be upon the evidence in said cause, and not upon any finding of said Court of Claims.

246 6, 7 & 8. Defendant, answering the sixth, seventh and eighth paragraphs of said petition, admits the said matters therein contained, but says that the said paragraphs contain matters of law and state no facts material to the issue involved herein.

9. Defendant neither admits nor denies that the 16000 tons of ice at Lake Pepin *was* lost, but denies that the 1232 tons of ice *was* lost; defendant further says that the statements in this paragraph are apparently findings of fact by the petitioner on the testimony before the Court of Claims, and that such findings by petitioner are not material, the said Act vesting in defendant the right to review said evidence and make such findings as seem right and proper to him.

10. Defendant admits the averments contained in the tenth paragraph of said petition, but says that the same are immaterial to any issue involved herein.

11. Defendant admits the passage of the Act of February, 1886, and that the sum therein appropriated was paid to Joseph W. Parish, but defendant denies the conclusions of law attempted to be deducted from said Act as alleged in said paragraph.

12. Defendant admits that the payments were made as in said twelfth paragraph alleged, but says that the other averments of said paragraph are wholly immaterial to any issue involved herein.

13. Defendant admits the passage of the Act of February 17, 1903, a copy of which is attached thereto in the petition as exhibit 3, but which is incorrectly quoted in said paragraph 13.

14. Defendant denies that the said Act of February 17, 1903, is a plain direction to defendant to pay the claimant an amount which would be rendered certain upon the statement of the account by the proper government accountant; but vested in your defendant the sole right and duty to determine what amount, if any, is due the said Joseph W. Parish. Further answering said paragraph defendant says that the reports of the committees referred to are immaterial to any issue involved in the present case.

15. Answering the fifteenth paragraph the defendant says that the said Parish was not able to deliver said ice as in said paragraph alleged, and that defendant, after a full consideration of all of the evidence in the Court of Claims on this question, has decided that the said Parish was not able to deliver the said ice as in this paragraph alleged. Defendant further says that the matters and things set out in the fifteenth paragraph of said petition are wholly immaterial to any issue involved herein.

16. Defendant denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered under said contract. Defendant further says that the said Court of Claims found, as a fact, that said profits could not be ascertained, their finding being the twelfth specification, which reads as follows:

"XII. The profits which the claimant would have made upon 30,000 tons of ice, less 12,768 tons, to wit, 17,232 tons, if the same had been accepted by the defendants' officers in the manner prescribed by the order of 25th March, 1863, were \$— per ton, amounting to \$—. The loss sustained by the claimant upon the 10,000 tons of ice purchased and lost at Lake Pepin was \$— per ton."

Defendant further says that the matters and facts contained in said sixteenth paragraph are wholly immaterial to any issue involved herein.

17. Defendant denies that the evidence in the Court of Claims shows that the transportation of ice at Lake Pepin and elsewhere was practicable. Defendant further says that after a thorough consideration of all of the evidence in the Court of Claims on this question, he decided that said transportation of ice from Lake Pepin was impracticable. Defendant further says that the matters and things set up in said seventeenth paragraph of said bill are wholly immaterial to any issue involved herein.

18. Defendant says, as will be hereafter more fully set forth, that defendant has determined and stated the full amount due said Parish in accordance with the evidence collected in the case in the Court of Claims, and under the rule for the measure of damages in the case of *United States v. Behan*. Defendant further admits that, as will be hereafter more fully set forth, defendant referred the case to the Auditor for the War Department for the latter's examination and advice thereon, and that the said Auditor examined and stated the said account in the terms set forth in said paragraph; defendant further says that on the 26th day of January, 1904, the said Auditor revised his said statement and found that nothing was due the said Parish on said claim.

19. Defendant admits that the quotations in said paragraph are taken from a report made to said Auditor for the War Department by a clerk in his office under the title of "Law Board"—which report was made by said clerk solely for the advice and assistance of said Auditor in making his report to defendant. Defendant says that the averments of this paragraph are wholly immaterial to any issue in the present case.

20. Defendant admits that the said Auditor for the War Depart-

ment sent to Parish a letter, a copy of which is set forth in said paragraph, but that said letter was sent before the said Auditor revised his said statement of said account. Defendant further says that the matters contained in said twentieth paragraph are wholly immaterial to any issue involved in this case.

21. Defendant denies each and every allegation contained in the twenty-first paragraph of said petition. Defendant further says that the allegations therein contained are wholly immaterial to any issue involved herein.

22. Defendant denies that every prerequisite for the payment of any money to Parish has been complied with.

Defendant further says that on the 31st day of May, 1904, he decided that under the said Act of Congress of February 17, 1903, there was no balance due to the said Parish, and therefore declined to pay any money to said Parish.

248 23. Further answering said rule to show cause and said petition, this defendant says:

That after the passage of the said Act of Congress of February 17, 1903, and at the request of said Parish, defendant, as Secretary of the Treasury, took up for consideration the said claim of said Parish; that thereupon defendant requested his subordinate, the Auditor for the War Department, to examine and settle the said account and to report to defendant his opinion and advice thereon; that the said Auditor examined the said account, and on the 11th day of August, 1903, stated the same as set forth in paragraph 18 of the petition, and on the same day transmitted his certificate of statement to defendant for his action; that on the 12th day of August, 1903, defendant referred said account to his subordinate, the Comptroller of the Treasury for re-examination, and for his opinion and advice thereon; and that said Comptroller re-examined the said claim, and on the 21st day of January, 1904, advised defendant that in his opinion there was nothing due to said Parish under said Act of February 17, 1903, and revised the said account; and that on the 26th day of January, 1904, pursuant to said revision of said Comptroller said Auditor cancelled the certificate theretofore made by him, and certified that there was nothing due said Parish on account of said claim; that defendant also referred the matter to the Solicitor of the Treasury and requested the latter's opinion and advice thereon, and on the 12th day of January, 1904, said Solicitor of the Treasury advised defendant that in his opinion there was nothing due to said Parish under said Act of Congress on account on said claim. That thereafter, and pursuant to the authority and direction of said Act of February 17, 1903, defendant, acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him under the contract described in said Act of Congress, and into the evidence in the case collected in the United States Court of Claims, and, after and upon such full and complete examination, and upon full and deliberate consideration thereof, and of the said opinions and advice so theretofore at his request given to him by his said subordinates and the said Solicitor of the Treasury as hereinbefore set forth, and in the

exercise of the judgment and discretion conferred upon him by said Act of Congress, did, on the 31st day of May, 1904, determine and ascertain the full amount which should have been paid said Parish if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court in said case of United States against Behan, and in accordance with the evidence in the case collected by the Court of Claims, and did deduct therefrom all payments which have been made to said Parish, and did determine and ascertain and state that, under the said rule and evidence, no balance is due to said Parish on account of said claim; a copy of said determination of this defendant is hereto attached marked "Exhibit A" and made a part hereof.

L. M. SHAW.

DANIEL W. BAKER,
Attorney for Defendant.

249 DISTRICT OF COLUMBIA, ss:

Leslie M. Shaw, being first duly sworn, upon his oath deposes and says that he is Secretary of the Treasury and as such secretary is the defendant named in the foregoing answer; that he has read the said answer, and that the matters and things therein set forth of his own knowledge are true, and those set forth upon information and belief he believes to be true.

L. M. SHAW.

Subscribed and sworn to before me this 25th day of May, A. D. 1906.

[SEAL.]

JAS. N. FITZPATRICK,
Notary Public.

Filed June 2, 1906.

TREASURY DEPARTMENT,
WASHINGTON, May 31, 1904.

In the Matter of the Claim of JOSEPH W. PARISH under Act of Congress Approved February 17, 1903.

After a careful examination of the contract with J. W. Parish & Co., referred to in the act, and the evidence taken before the Court of Claims, and construing both in the light of the opinion in the case of the United States vs. Behan, which, under said act, is to govern, I have reached the conclusion that there can be no recovery by J. W. Parish or J. W. Parish & Co., in excess of the amount already received by them.

This conclusion is to my mind irresistible upon any one of several theories. A contrary conclusion can be reached only by relying upon a single clause of the act which directs the Secretary of the Treasury to determine and ascertain the full amount which should have been paid said J. W. Parish & Co. "if the said contract had been

carried out in full without change or default made by either of the parties thereto." The claimant urges this construction, but seems to forget that if the contract had not been changed by a letter bearing date of March 25, 1863, there could be no recovery. The contract is for the delivery at certain points of the "whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." The claimant bases his right to recover upon the modification of this contract by the letter referred to, which directs him to make immediate delivery of 30,000 tons. Certainly it was not the intention of Congress to ignore this letter; but if the interpretation sought by the claimant is to prevail strictly and literally, then the letter must be ignored. Of course the claimant asks that the letter ordering the immediate delivery of 30,000 tons of ice be made a part of the original contract.

But I do not think the language of the act justifies the exclusion of all that follows the phrase I have quoted, for it is separated only by a comma from specific instruction to continue the contract
250 and the evidence "under the rule of the measure of damages laid down by the Supreme Court in the case of the United States vs. Behan." The letter of March 25, 1863, was an order for \$630,000 worth of ice, and under that contract J. W. Parish & Co. have received, in one way and another, \$311,275.91. If the phrase in the act contended for by claimant is to prevail, there was no occasion to refer the matter to the Secretary of the Treasury for computation, for a child would know that if there had been no default by either party there would still be due Parish & Co. \$318,724.09. And it is reasonable to suppose that Congress would have appropriated that amount if it had intended that the claimant should receive that much.

The act forbids the claimant's conclusion, for it specifically provides that the computation shall be made "under the rule of the measure of damages laid down by the Supreme Court in the United States vs. Behan." The rule referred to, and which alone must govern, gives the measure of damages where default has been made. It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only when a vendee makes default, if the contract is to be construed as though no default had been made. The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default and did refuse to receive, or at least suspended its order for 30,000 tons of ice.

The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters. The evidence is clear, however, that Parish & Co. purchased 10,000 tons, and there is some evidence to support their claim that they purchased 16,000 tons of ice on Lake Pepin. It is also reasonably clear that they purchased at various other places an aggregate of 18,343 tons. The firm delivered to the Government and received pay for 12,771 tons, and they have been paid the cost of the remainder of the more than 34,000 tons claimed to have been purchased by them preparatory to the fulfillment of their contract. The present controversy is confined to prospective profits on the undelivered ice.

The evidence clearly shows that owing to a mild winter there was a short crop of ice, and the evidence is equally clear that there was a correspondingly ready market for ice during the summer of 1863, and that prices for ice were fabulously high. It is in evidence that the Government, after making demand upon Parish & Co. under its contract, actually paid as high as \$100 per ton for ice during that summer.

Parish & Co. claim that a portion of the ice purchased elsewhere than on Lake Pepin went to waste, and they claim prospective profits thereon. The ice purchased elsewhere than on Lake Pepin was all available for transportation, and if it went to waste it was because of neglect. No language in the Behan case, or in any other case, will justify a vendor in holding the subject of a rescinded sale, in the face of an advantageous market, until wasted or ruined by age, and then prosecuting an action for prospective profits. I consider it unthinkable that Parish & Co. did allow any ice purchased
251 at points readily accessible by rail or water to spoil while declining to fill orders from the Government, and in the face of a market value many times the contract price.

This disposes of all but the ten or sixteen thousand tons of Lake Pepin ice. When Parish & Co. executed their contract to furnish all the ice that the Government might require at designated points on the Mississippi River, ordinary prudence required them to make preparation to fill such orders as might from time to time be received. I will not go so far as to conclude that Parish & Co. should have purchased 34,000 tons, though I do not think a purchase of that amount would be considered unreasonable, even in the absence of the letter of March 25, 1863.

But conceding Parish & Co. claim that their purchases on Lake Pepin would not have been made but for this letter, it does not follow that they should have abandoned the Lake Pepin ice on the strength of the letter of the Assistant Surgeon-General, written six days later, suspending the order until "further instructions should be given." There is nothing in this subsequent letter of suspension to indicate that the Government had decided to accept any less amount than 30,000 tons, or that it had waived its right to demand 50,000 tons, or any other amount if more should be needed. The letter simply suspends the order for the immediate delivery of 30,000 tons "until further instructions are given." Parish & Co. as reasonable men, must act reasonably. On receipt of this letter Parish & Co. found themselves the owners of 16,000 tons of ice on Lake Pepin, and they were under contract to deliver to the Government, at certain places, all the ice it might require. As reasonable men they know there was but one season of the year when ice could be taken from Lake Pepin. It is in evidence that Parish & Co. fully understood the situation, for they sent a gang of men to Lake Pepin and held them there awaiting orders for over a week, but because of low water no boats or barges could reach the lake. Unable to remove the ice which cost them in the main \$2.50 per ton, it ultimately spoiled notwithstanding a market at \$100 per ton down the river.

No language in the Behan case justifies the recovery of prospective profits for merchandise which the vendor not only fails to render but is likewise unable to deliver. Conceding that when a contract is countermanded the vendor is excused from tendering the subject of the sale, he certainly cannot recover without proof of ability to make delivery. For instance, Parish & Co. could not recover even the cost of ice purchased in Alaska to fill a contract subsequently rescinded, without proving that it was physically possible to deliver the ice from Alaska, and they could not recover prospective profits thereon without proof that it could be delivered under the contract at a profit. The evidence fails to show that at any time after March 25, 1863, Parish & Co. could have delivered the ice from Lake Pepin had they sought so to do. There had been put up during the previous winter on Lake Pepin by various parties, as the evidence shows, about 40,000 tons of ice, of which fully 34,000 tons were never moved, and at least one shipment of the 60,000 tons
252 or so that were shipped all melted in transit. In view of the ice famine at Chicago and points south, it is evident that cheap transportation from Lake Pepin was wanting.

Counsel insist that because it is shown that at some times, in some years, and at one time in the year 1863, ice could have been and actually was taken from the lake to regularly navigable points on the river, therefore a recovery is authorized in this case. I reach no such conclusion. The natural and reasonable obligation of Parish & Co. to get the ice out of the lake to be ready to meet the suspended order, when the "further instructions" mentioned in the letter of suspension should be received, coupled with the fact that they did try and failed, is conclusive to my mind that it was impossible to deliver the ice, and if impossible, then prospective profits cannot be recovered.

This view of the case is in strictest harmony with the familiar rule on which the claimant relies and by which the Secretary of the Treasury is to be controlled, as expounded, rather than promulgated, in *United States vs. Behan*. I quote from the opinion:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first what he has already expended towards performance (less the value of materials on hand); secondly the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires."

Parish & Co. have been paid the first of these two items.

They have been paid what they expended towards the performance of their contract, to-wit, the cost of the ice, and this they have been paid without deducting the value of the ice left on their hands. They seek to recover in this instance because of an alleged breach of contract. If there was a breach of contract that breach occurred

on March 31, 1863, at which time they claim to have owned 16,000 tons of ice on Lake Pepin and a quantity of ice elsewhere. They have been paid the cost both of the Lake Pepin ice and the other undelivered ice purchased elsewhere, without deducting its value on March 31st. In other words, the Government has paid them the cost of the ice and then given them the ice.

This investigation relates solely to the second item referred to in the quotation from the opinion as "profits that would have been realized by performing the whole contract." But the Court lays down the rule (and it is by this rule that the Secretary of the Treasury is to be governed in deciding this case) that profits cannot be recovered when "remote and speculative in character." Getting ice from Lake Pepin to the southern waters of the Mississippi River during the spring and summer of 1863 was admittedly a precarious enterprise, and the profits to be derived from such a transaction must be equally remote and speculative. The claimant invokes the 253 rule laid down in *United States vs. Behan*, and that rule declares that profits cannot be recovered when "incapable of that clear and direct proof which the law requires." The Secretary of the Treasury is also directed in the act to confine his investigations to the evidence taken before the Court of Claims, and that evidence contains "no clear and direct proof" as to the profits that might have been made had the ice been delivered.

Parish & Co. brought suit in the Court of Claims originally for \$60,000, which included prospective profits, and by an amended petition they increased their demand to \$250,887.72. But counsel for Parish & Co. virtually concede that the evidence does not justify prospective profits, for they ask the Court of Claims in its finding of facts to fix their damages at \$65,737.70.

The Act of Congress under which this investigation is being made limits the Secretary of the Treasury to the evidence taken before the Court of Claims. If the evidence there taken was insufficient to justify counsel for claimants to ask a finding covering prospective profits, the same evidence is insufficient to allow the payment of prospective profits under the act.

Under the original contract Parish & Co. were to be paid "for each and every ton of ice delivered and accepted by the Medical Officer in charge." The fact that payments were to be made from time to time upon "receipted bills of lading and duplicate accounts certified by the Medical Officer in charge," constitutes no modification of the previous provision. The contract was to be completed by delivery of the ice at certain specified points. The subsequent clause concerning payments does not have the effect of rendering the contract complete by delivery of the ice f. o. b. cars or boats. Parish & Co. must have so understood the contract, for they purchased something over 34,000 tons with which to fill the order for 30,000 tons, and they have successfully prosecuted their claim for the cost of the entire purchase. This must be upon the theory that they were to be paid for the ice actually delivered, and that in order to deliver 30,000 tons, the purchase of 34,000 tons was not unreasonable. The evidence shows that some shipments of ice to Missis-

Mississippi River points lost by meltage 33 per cent. and some shipments from Lake Pepin 100 per cent. The profits in shipping ice from Lake Pepin in 1863 are therefore "incapable of that clear and direct proof which the law requires."

The claimants have nothing of which they can legitimately complain. They contracted to deliver the "whole amount of ice required to be consumed at or in the vicinity" of certain points on the Mississippi River and its southern tributaries. The ice was to be of quality "A No. 1." They were to receive pay "for each and every ton of ice delivered and accepted by the Medical Officer in charge." As a matter of fact they have received pay for more than 1,600 tons of melted ice (\$31,743.00). They were to deliver all the ice required at these several points. But the fact appears of evidence that the Government made demand for ice which the claimants failed to deliver, and that thereafter the Government paid \$100.00 per ton therefor, and it has never made a claim against Parish & Co. for damages. Under their contract to deliver all the ice that was required, they claim to have purchased 34,000 tons, some of it so situated that it could be easily delivered, and as the evidence shows, 10,000 or 16,000 tons at a point whence it could not be delivered. The Government has paid the contract price for all it has received, and has accepted and paid for 1,600 tons of water, and has paid the claimants, in addition, all their expenses not only in connection with the 16,000 tons of ice at Lake Pepin, which the evidence fails to show could have been delivered, but also paid for upwards of 4,000 tons at available points, and has made no claim for the value of any of this ice left in the hands of Parish & Co. The original claim made by Parish & Co. in the Court of Claims was for \$60,000. By an amendment subsequently filed the claim was increased to a little less than \$252,000. After the evidence was all in, counsel for claimants asked judgment for a little over \$65,000. The Court of Claims allowed \$10,444, and by a special appropriation they have been paid \$58,341 additional. This is \$8,000 more than their original claim, and \$3,000 more than was asked after the evidence was all in. Counsel for the claimants now ask \$181,358.95, which is the amount conceded to be due, if anything, under the act. I reach the conclusion that nothing is due.

That J. W. Parish was an energetic, patriotic citizen there is abundant proof. He fitted a regiment at his own expense, and in many ways inspired the community in which he lived and the people whom he met with a spirit of patriotism at that time much needed. But if it is to be rewarded in any sum in excess of what has already been paid, Congress must fix the amount by specific appropriation.

L. M. SHAW.

Demurrer to Defendant's Answer.

Filed June 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48507.

THE UNITED STATES ex Rel. EMILY E. PARISH, Executrix of Joseph
W. Parish, Deceased,

V.

LESLIE M. SHAW, Secretary of U. S. Treasury.

1. The plaintiff says the allegation in the first paragraph of respondent's answer, that the rights of said Joseph W. Parish, acquired under the Act of February 17, 1903, were not property which could pass to his personal representatives, is bad in substance.

NOTE.—One of the matters to be argued at the hearing of this demurrer is that said rights are in the category of rights of property, which do pass to the personal representative of said Parish.

255 2. The plaintiff says that the 4th paragraph of respondent's answer is bad in substance in that it states no facts to justify the denial contained therein.

3. The plaintiff says that the 5th paragraph of respondent's answer is bad in substance.

NOTE.—One of the matters to be argued at the hearing of this demurrer, is that said Act of Congress of February 17, 1903, does make the findings of the Court of Claims material, and does not permit the Secretary of the Treasury to substitute his own findings therefor.

4. The plaintiff says that the 9th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing that the said paragraph states no fact to justify the denial "that the 1,232 tons of ice was lost;" and further that it erroneously construes said Act, as "vesting in defendant the right to review said evidence and make such findings as seem right and proper to him."

5th. The plaintiff says the 14th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing of this demurrer that said paragraph erroneously construes the said Act of February 17, 1903; and further that as matter of law, "the reports of the Committees referred to" are material to the issue involved in the present case.

6. The plaintiff says that the 15th paragraph of respondent's answer is bad in substance.

NOTE.—At the hearing of this demurrer, it will be argued that the respondent's denial is insufficient, for the reason that it states no facts to justify it. It is therefore an insufficient denial.

7. The plaintiff says that the 16th paragraph of respondent's answer is bad in substance, for the reason among others, that no fact is stated therein to justify the denial. It is therefore an insufficient denial.

8. The plaintiff says that the 17th paragraph of respondent's answer is bad in substance, for the reason among others, that no fact is stated to justify the denial that the transportation of ice was practicable. It is therefore an insufficient denial.

9. The plaintiff says that the 18th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing of this demurrer, that the respondent has not stated the amount due said Parish under the rule for the measure of damages in *U. S. v. Behan*; and further that the respondent states no facts to justify his refusal to issue a warrant in accordance with the Auditor's report, or to justify his own arbitrary compulsion to the Auditor to cancel the arithmetical result the Auditor had been directed to ascertain, and had ascertained.

10. The plaintiff says the 21st paragraph of respondent's answer is bad in substance, for the reason that not one fact is stated to justify the denial of plaintiff's allegations therein contained. It is therefore an insufficient denial.

256 11. The plaintiff says that the 22nd paragraph of respondent's answer is bad in substance, for the reason that no facts are stated to justify the denial therein contained. It is therefore an insufficient denial.

12. The plaintiff says that the 23rd paragraph of respondent's answer is bad in substance.

NOTE.—At the hearing of this demurrer it will be argued, that said paragraph states no fact to justify the attempted re-cission by the Secretary of the Treasury of the account stated by the Auditor for the War Department on the 11th day of August 1903; nor any facts to warrant the steps thereafter taken by the respondent to give countenance to an arbitrary refusal to pay the sum, so found due to said J. W. Parish, by exact and competent computation, in the way provided by Congress.

13. The plaintiff says, that the whole answer of respondent is bad in substance.

NOTE.—At the hearing of the demurrer to respondent's answer, it will be argued:

a. That said answer is demurrable, unless it shows a right to refuse obedience, by the statement of facts, which justify such refusal clearly, specifically, and with such certainty, that the Court can see, that if admitted or established, they furnish a legal alternative for obedience to the writ;

b. That a demurrer to the assertion or denial of a legal conclusion, without showing the facts, which support or forbid such conclusion, must always be sustained.

c. That if any pleading misstates the effect of a Statute, the adverse party, in demurring, does not admit the correctness of the construction claimed, or that the Statute imposes the obligation or confers the rights alleged;

d. That the return to the writ of mandamus must state all the facts relied upon by the respondent with such precision and certainty, that the Court may be fully advised of all the particulars, necessary to enable the Court to pass upon the sufficiency thereof; and the statements of the return cannot be supplemented by inference or intendment.

HOLMES CONRAD,

Of Counsel for Pet'r.

LEIGH ROBINSON,

Of Counsel for Plaintiff.

Supreme Court of District of Columbia.

WEDNESDAY, February 13th, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * *

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No. 48507. At Law.

THE UNITED STATES ex Rel. EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Petitioner,

vs.

LESLIE M. SHAW, Secretary of the United States Treasury.

This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibit and affidavit, and the demurrer to said answer. Whereupon, after argument thereon by attorneys for the respective parties, it is considered and adjudged that the prayers of the petition herein be, and hereby are denied, the rule to show cause discharged and the petition dismissed at the costs of petitioner.

From the foregoing the petitioner by *his* attorneys in open Court notes an appeal to the Court of Appeals. Whereupon, bond for costs is hereby fixed in the sum of One Hundred Dollars.

Judgment of Court of Appeals.

No. 1771, April Term, 1907.

THE UNITED STATES ex Rel. EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, June 4th, A. D. 1907.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and

adjudged by this Court, that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD,

June 4, 1907.

Affidavit of W. R. Graham.

Filed May 9, 1911.

No. 28561. Equity.

JONAS H. MCGOWAN et al.

vs.

EMILY E. PARISH, Executrix.

DISTRICT OF COLUMBIA, ss:

W. R. Graham, being first duly sworn, according to law deposes and says, that in the testimony taken and returned and filed 258 in the above entitled cause, the word "assignment" in the fourth line on page 323 thereof should be "argument."

In stenography the characters that indicate the two words are very much alike.

My stenographic notes show the word to have been argument.

In dictating the contents of page 323, from my notes, I made the error of using the wrong word.

W. R. GRAHAM.

Sworn to and subscribed before me the eighth day of May, A. D. 1911.

[SEAL.]

E. L. WHITE,

Notary Public, District of Columbia.

Certificate as to Deposit of Money to Credit of Cause.

Filed October 19, 1911.

* * * * *

This is to certify that on the seventh day of June, in the year 1909, there was deposited with this Company and to the credit of the above entitled cause, in pursuance of the interlocutory decree entered therein on the second day of June, in the year 1909, the sum of Forty-one Thousand (41,000) Dollars, and that said sum with accrued interest thereon at the rate of two (2) per cent per annum to the ninth (9) day of October, 1911, amounting in all to the sum of Forty-Two Thousand, Nine Hundred and Forty-One Dollars and Four Cents (\$42,941.04), is now on deposit with this Company subject to the aforesaid decree of the Supreme Court of the District of Columbia.

Dated this nineteenth (19) day of October, 1911.

AMERICAN SECURITY AND TRUST CO.,

By CORCORAN THOM, *Vice President.*

Attest:

[SEAL.] JAMES F. HOOD, *Secretary.*

Complainants' Designation of Record on Appeal.

Filed October 30, 1911.

* * * * *

The complainants, by their Solicitors, designate the following additional parts of the record in the above cause, to be included in the transcript of record for appeal:

1. Petition for Mandamus, filed by defendant May 2, 1906, set out in pages 1 to 15, both inclusive, in Complainant's Exhibit No. 1, filed with Bill.
2. Relator's Exhibit No. 3, with her said Petition for Mandamus, set out in said Exhibit No. 1, at pages 17 to 27, both inclusive.
- 259 3. Relator's Exhibit No. 4 with her said Petition, set out at page 28 of said Exhibit No. 1.
4. Answer of Respondent in said Mandamus Cause, at pp. 28 to 37, both inclusive, of said Exhibit No. 1.
5. Demurrer to said Answer of Respondent, at pp. 38-40 of said Exhibit No. 1.
6. Judgment of the Supreme Court of the District of Columbia in said Mandamus proceeding, at p. 40 of said Exhibit 1.
7. Judgment of the Court of Appeals of the District of Columbia in said Mandamus proceeding, at p. 50 of said Exhibit No. 1.
8. Order substituting Josephine P. McGowan as party complainant, in above entitled Equity Cause, passed Aug. 2, 1909.
9. Certificate of the American Security and Trust Company, filed October 19, 1911.
10. Affidavit of W. R. Graham filed May 8, 1911, that the word "assignment" in Paper B, Complainants' Exhibit 25, is a clerical error for "argument."

NATH'L WILSON,
J. J. DARLINGTON,
Solicitor for Complainants.

October 30, 1911.

NOTE.—The complainants reserve the right to move the Court of Appeals for production before it for examination of the original document Complainants' Exhibit 1, Agreement of Parish with Brookshire of January 20th, 1903.

NATH'L WILSON,
J. J. DARLINGTON,
Solicitors for Brookshire.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 474, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in Equity Cause No. 28531, wherein Josephine P. McGowan, Executrix, &c., et al. are Complainants and Emily E. Parish, Executrix, &c. is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of December, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

260 In the Court of Appeals of the District of Columbia.

No. 2371.

EMILY E. PARISH, Executrix, Appellant,

vs.

JONAS H. MCGOWAN et al., Appellees.

The appellant designates that the Clerk of the Court of Appeals in printing the record in the above entitled cause eliminate therefrom the following pages, to-wit: Pages 447 to page 456 inclusive the same being the report of Mr. Graff from the House Committee (Complainant's Exhibit 8) already incorporated in the record on page 358 et seq.

HOLMES CONRAD,
LEIGH ROBINSON,

For Appellant.

Service acknowledged—

NATH'L WILSON,

Per E. L. WHITE,

For Appellee McGowan.

Left a copy of the above at Mr. Darlington's office.

LEIGH ROBINSON.

[Endorsed:] In the District Court of Appeals. No. 2371. Emily E. Parish, Executrix, Appellant, vs. Jonas H. McGowan, et al., Appellees. Appellant's designation of pages to be omitted from printed record. H. C. & L. R. for appellant. Court of Appeals, District of Columbia. Filed Dec. 7, 1911. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia supreme court. No.

2371. Emily E. Parish, &c., appellant, vs. Josephine P. McGowan, &c., et al. Court of Appeals, District of Columbia. Filed Dec. 5, 1911. Henry W. Holges, Clerk.

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WEDNESDAY, October 9th, A. D. 1912.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas M. McGowan,
Deceased, and ELIJAH V. BROOKSHIRE.

The argument in the above entitled cause was commenced by Mr. Leigh Robinson, attorney for the appellant, and was continued by Messrs. J. J. Darington and Nathaniel Wilson, attorneys for the appellees, and by Mr. Leigh Robinson, attorney for the appellant.

THURSDAY, October 10th, A. D. 1912.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas M. McGowan,
Deceased, and ELIJAH V. BROOKSHIRE.

The argument in the above entitled cause was concluded by Mr. Leigh Robinson, attorney for the appellant. On motion the appellees are allowed until Monday to file additional authorities herein, with leave to the appellant to reply thereby by Thursday next.

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No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan,
Deceased, and ELIJAH V. BROOKSHIRE.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is a suit in equity begun May 22, 1909, by Jonas H. McGowan and Elijah V. Brookshire against Emily E. Parish, executrix of Joseph W. Parish, deceased, Franklin MacVeagh, Secretary of the Treasury, and Charles H. Treat, Treasurer of the United

States, to recover part of a fund realized on a claim of said Parish against the United States.

The bill alleges that on August 4, 1900, and for a long time prior thereto, Joseph W. Parish, had and had asserted a claim against the United States for a large sum of money alleged to be due by virtue of a contract for the delivery of ice. That he entered into a contract with the complainant, Jonas H. McGowan, for the prosecution of said claim. Said contract set out in the bill recites the employment of McGowan by Parish to prosecute his claim for ice furnished the Army under contract with the United States, during the late war; and further that in consideration of the professional services rendered and to be rendered by McGowan and others whom he may employ in the prosecution of said claim, he agrees and hereby binds himself, his heirs and legal representatives to pay to said McGowan, his heirs and legal representatives, a fee equal in amount to fifteen per centum of whatever sum of money or other indebtedness may be awarded or collected on account of said claim. It is likewise agreed that McGowan shall have control of said prosecution to its final determination with power to receive and receipt for any draft or other evidence of indebtedness, which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated.

Parish further agreed to furnish all the evidence and papers that may be required in the prosecution of said claim and to execute and deliver to the party of the second part such powers of attorney, or other papers as will be necessary for the prosecution and collection of said claim and the payment of said fee. It is further agreed that in no event shall said Parish, assign, transfer, or otherwise dispose of said claim or any part thereof, and this agreement shall not be affected in any particular by any revocation of the authority granted, or which may be granted to McGowan, nor by any services rendered, or which may be rendered by others, or by Parish, his heirs, or legal representatives. McGowan agrees to diligently prosecute said claim to the best of his professional ability to its final termination. This contract was executed by both parties on August 4, 1900.

The bill further alleges that McGowan was a lawyer engaged in the practice of law in the District of Columbia, practicing largely before the Court of Claims and the executive departments. That for a long time prior to said last mentioned date said McGowan had rendered professional services as a lawyer to the said Parish in the preparation and prosecution of said claim. That after said contract was entered into McGowan continued diligently to render his professional services in the prosecution of said claim before the Congress of the United States and various committees thereof. That on December 3, 1902, McGowan and the said Parish being desirous of securing the services of said complainant, Elijah V. Brookshire, as a lawyer in the prosecution of said claim in cooperation with the said McGowan, the latter executed an assignment to said Brookshire whereby in consideration of five dollars and other valuable considerations, he assigned, sold and transferred and set over to said Brookshire, the undivided one-third interest in the contract made between

Parish and himself, bearing date August 4, 1900. It was the intention of this assignment to convey to said Brookshire 5 per cent, or one-third of whatever money might be paid to McGowan under said contract. It was further understood that this agreement would terminate with services in the present Congress, provided the bill does not pass, but in case it does pass and become a law, will then terminate with the action of the Secretary of War, and the final determination of said claim for ice by the executive and disbursing officers of the Government.

263 It further alleges that on the 20th day of January, 1903, the said Parish and complainant Brookshire entered into an agreement in writing, which was duly executed by both parties. This agreement recites that for value received and for legal services hereafter rendered and to be rendered in the prosecution of said claim, said Parish agrees to pay said Brookshire a sum equal to 5 per cent of the amount awarded or appropriated for said claim. This contract to be an order upon the proper officers of the Government, or any one authorized to disburse said award so appropriated, and it is expressly understood that the said Brookshire shall have a lien for the amount due upon the amount of said award when same is made. Said Brookshire agreed to render the necessary legal services in the prosecution of the above described claim under the direction of said Joseph W. Parish.

It is further alleged that pursuant to the employment above mentioned, and the agreements hereinbefore set forth, the said complainants diligently prosecuted the said claim and rendered valuable legal and professional services in respect thereto and in preparing and making arguments before the proper committees in Congress, in collecting evidence and in filing and presenting to said committees petitions, briefs, and arguments in their efforts to obtain an act of Congress for the relief of said Parish and providing for the settlement of said claim. Thereafter, Congress passed an act providing for the referring of the claim of said Parish to the Secretary of the Treasury for examination and payment of any balance due him, which was approved February 17, 1903, 32 Stat., 1612-1613.

Immediately after the passage of the act, which was drafted by the said McGowan, and which was advocated and urged in all proper ways before the several committees of the House and Senate, the Secretary of the Treasury, referred to the proper officer of the Government, namely the Auditor for the War Department, the claims of said Parish, and the papers relating thereto. Complainants appeared before the Auditor and rendered valuable professional services, and filed briefs and arguments in behalf of the said claim. That on or about the 11th day of August, 1903, the said Auditor made a finding and declared that there was a balance due to said Joseph W. Parish of \$181,358.95. That on receiving the said finding and award from the said Auditor, the said Secretary of the Treasury referred the same to the Comptroller of the Treasury for examination and report. The complainants appeared before the said Comptroller and submitted to him elaborate arguments. The

Comptroller returned said papers with an adverse report to the Secretary of the Treasury, and thereupon further consideration was given to the said award by the Secretary of the Treasury, and the same was then referred to the Solicitor of the Treasury, before whom the complainants appeared and made further arguments. The Solicitor of the Treasury returned the said claim to the Secretary of the Treasury with an opinion adverse to the payment of the same. Thereupon the Secretary of the Treasury, at that time Leslie M. Shaw, again considered the said claim and the same was again argued before him by the complainants at great length. That on May 31, 1904, the Secretary of the Treasury declined and refused to pay any balance whatsoever, and made his final decision to that effect.

That after this decision the complainants advised with said Parish in respect to the steps necessary and proper to enforce payment of said award, and to obtain payment of the claim, and had especially under advise ment and consideration the propriety of filing in the Supreme Court of the District of Columbia a petition for the writ of mandamus to compel the Secretary to issue a draft in favor of said Parish for the balance found to be due by the Auditor, and were still considering and still had under advisement the filing of a petition for a writ of mandamus, and were awaiting the return of the said Parish to the District of Columbia, from which he had been absent for some time, until the time of his death, which occurred in the city of Washington on December 26, 1904.

That for a long time prior to the death of the said Joseph W. Parish he and his family had been in necessitous circumstances and in order to relieve their pressing wants, the complainants had from time to time advanced to him for the benefit of himself and family various sums of money amounting in the aggregate to the sum of \$5,000, relying solely upon his promise to repay the sums so loaned out of what might be recovered in respect of said claim. That after the death of said Parish on April 30, 1905, the will of the said Joseph W. Parish was presented in the Probate Court of the District of Columbia by the defendant, Emily E. Parish, daughter of said Joseph W. Parish, who was named in the said will as his executrix. On April 7, 1905, the will was admitted to probate and letters testamentary were issued to the said executrix and a bond approved by the court for the sum of \$500.

That it was stated to the Probate Court that the estate of said Parish consisted of his claim against the United States and his wearing apparel. That since the probate of said will claims against the estate have been presented by different persons amounting in all to about \$23,000.

That after the death of the said Parish and the probate of said will, the executrix disregarding the rights of these complainants and their interests in the subject-matter, of the claim of said Joseph W. Parish and the services rendered by these complainants, and well knowing that the complainants were ready and willing to render their services in the further prosecution of said claim, employed other counsel, without consulting with, or advising complainants, for the further prosecution and collection of said claim, and on

May 2, 1906, said executrix by said attorneys filed in the Supreme Court of the District of Columbia her petition for writ of mandamus to the Secretary of the Treasury requiring him to issue a draft in favor of said Emily E. Parish for the sum of \$181,358.95
234 basing her petition solely on the ground that "every condition precedent to payment to said Joseph W. Parish in accordance with the act of February 17, 1903, had been satisfied by the examination made by the Auditor for the War Department, and that therefore there remained only the ministerial duty on the part of the Secretary of the Treasury to pay the amount allowed by the Auditor." Said petition was dismissed by Judgment of the Supreme Court of the District; that judgment was appealed to the Court of Appeals of the District of Columbia, and by its judgment entered the 4th day of June, 1907, the said court affirmed the said judgment of the Supreme Court of the District; that an appeal was taken to the Supreme Court of the United States, and on May 17, 1909, that court reversed the judgment of the courts below, and directed that the writ of mandamus issue as prayed. That complainants are informed and believe that the mandate of the Supreme Court will be forthwith be sent down and that the said writ of mandamus will be immediately issued to the Secretary of the Treasury commanding him to issue a draft in favor of Emily E. Parish, executrix, for the sum of \$181,358.95. That complainants are further informed, and believe, that it is the expressly declared intention of the said executrix to ignore and refuse to recognize the lien and claim of your complainants in and to the said fund, created and established in and by the contracts and agreements hereinbefore mentioned and set forth, and by the valuable and indispensable service of your complainants rendered in the prosecution of said claim, but on the contrary the said executrix and her brother, Grant Parish, had avowed and declared that they, the said complainants, shall never receive a cent of said money. That the said estate of Joseph W. Parish is insolvent, and that complainants believe that Emily E. Parish and Grant Parish are insolvent, and if they receive into their hands the draft or the proceeds of the draft about to be issued by the Secretary of the Treasury, they will immediately take the same out of the jurisdiction of this court for the purpose of defrauding and defeating complainants of their rightful lien and claim on the said fund.

That by reason of the premises and the professional services so severally rendered by the complainants and each of them as aforesaid, and by reason of the agreements, the complainants severally became and are the equitable owners of the tenth part or 10 per cent of the award, and are entitled to have paid to each of them and to receive one-tenth part of the amount of said award; and each one is entitled to receive, demand and receipt for the one-tenth part or portion of any and all moneys that are or shall be paid in respect thereto.

The prayers are, first: that the court will determine and decree that each of the said complainants are entitled to 10 per cent of said award, and that they are each the equitable owners of 10 per cent of said amount.

Second. That the defendant, Emily Parish, executrix, may be enjoined from applying and receiving from the Government of the United States, or any officer thereof, any draft, check, order, or warrant for the payment of the said award, and from receiving the one-tenth part of said award belonging to said complainant McGowan, and the one-tenth part belonging to said complainant Brookshire.

Third. That the Secretary of the Treasury of the United States, the Treasurer of the United States and their successors be enjoined from issuing any draft, check, warrant, or order to the said executrix, her assigns, or attorneys, in payment of said award or finding.

Fourth. That a receiver may be appointed by this court with authority to demand and receive from the Secretary of the Treasury, or the Treasurer of the United States, the payment of the said award in full and hold the same subject to the further order of this court.

Fifth. That the defendant executrix, her attorneys, agents, and representatives be enjoined from applying for, or demanding from the Secretary of the Treasury, any draft or order for said amount, or from applying for any amount from the said officers equal to one-tenth part of said award, belonging to and claimed by the complainants respectively; and for general relief.

On the same day that the bill was filed, namely, on May 22, 1909, a restraining order was granted enjoining the Secretary of the Treasury from issuing the draft aforesaid to the said executrix. On June 2, 1909, before answer was filed an interlocutory decree was entered by consent. First dissolving the order and dismissing the bill as to the Secretary of the Treasury, and the Treasurer of the United States, and further that said restraining order is dissolved, as to said executrix; provided, however, that on receipt of the sum of \$41,000 and in respect of any warrant, draft or check that may be issued therefor by the Treasury Department, or any officer thereof, as being a part of the award or finding for the sum of \$181,358.95; the said executrix is enjoined from receiving the said \$41,000 and is required and directed to make the proper power of attorney, authorizing and empowering Corcoran Thom, Vice-President of the American Security and Trust Company, to receive any warrant, draft, or check for her as executrix, and to collect the proceeds thereof and deposit the same when received with the American Security and Trust Company subject to the further order of this court and to the determination by this court whether any amount, and if so what amount, is justly due the complainants, or either of them, for professional services, in respect of the matters described in the bill of complaint. Said American Security and Trust Company shall hold the said sum of \$41,000 so deposited with it and shall pay interest thereon at the rate of 2 per cent per annum; said sum with the accrued interest thereon to be subject to the order and decree of this court in this cause.

On August 2, 1909, the death of the complainant, McGowan having been suggested, his executrix, Josephine P. McGowan, was substituted as a party complainant in his stead.

The answer of defendant, filed September 29, 1909, alleges that defendant had no personal knowledge of the several agreements

set out in the bill; that she had no knowledge to what extent complainants rendered professional services to said Parish and calls for strict proof of same. That the agreements aforesaid were in violation of section 3477 of the Revised Statutes, therefore null and void.

This defendant, has, however, joined in the consent for a
265 decree in this cause, whereby the sum of \$41,000 was directed to be deposited to the American Security and Trust Company to the credit of this cause subject to the determination of the court in this cause, whether any amount, and if so what amount, is justly due complainants, or either of them for professional services rendered for and in respect of the matters described in the bill of complaint.

This defendant is advised that the utmost which either complainant could claim for legal services would depend upon their reasonable value, and the reasonable value would depend upon what legal services, if any, were rendered. In directing attention to the inhibition interposed by section 3477, to the relief prayed for in the bill, to wit, that the court decree that the said McGowan has an equitable lien on said finding and award, and on the moneys made payable thereby to the amount of \$18,135.89, and that the complainant Brookshire has an equitable lien on said finding and award and moneys payable to the amount of \$18,135.89, the object of defendant is not to secure the transfer to another forum of any valid contention, which it is in the power of complainants to make under their alleged contracts, but simply to exhibit, as her duty requires, the limitations imposed by law thereon, in whatever forum the same may be adjudicated.

She admits that Congress passed the act set out in the bill, but can not admit or deny whether complainants did advocate and urge the same in all proper ways before the several committees of the House and Senate, and before the Auditor of the War Department and calls for strict proof thereof. She denies that after the decision made and declared by the Secretary of the Treasury the complainant advised with the said Parish in respect to the steps necessary and proper to be taken to enforce payment of said award, and had especially under advisement and consideration the propriety of filing a petition for the writ of mandamus in the Supreme Court of the District of Columbia to compel the Secretary of the Treasury to pay the same, and they were still considering and still had under advisement the filing of the said writ and were awaiting the return of said Joseph W. Parish to the District of Columbia, from which he had been absent for some time, until the time of his death, which occurred on December 26, 1904. This defendant denies each and all of these allegations. She further avers that never once did the complainant approach her, after her father's death and after her qualification as executrix, in respect of the steps necessary to be taken to enforce payment of said award. In the long interval between the refusal by the Secretary to pay and the filing of the suit in mandamus, the suggestion of mandamus as the remedy came to her for the first time from the counsel who filed the said mandamus in her behalf. From no others did she ever hear of that remedy. Defend-

ant says that by their action, said complainants, after the refusal of the Secretary, abandoned all prosecution of the claim of her testator against the United States and sought not by any word to correct that which their action or non-action conveyed.

The defendant has no knowledge of the loan of \$5,000, and therefore calls for strict proof. That if the said indebtedness did exist it was a simple contract indebtedness and was payable out of the general assets of the estate; and like any other simple contract obligation was barred by the Statute of Limitations. She pleads the Statute of Limitations in bar thereof.

Defendant denies that after the death of the said Parish she disregarded the rights of said complainants, and denies that complainants were ready and willing to render their services in the further prosecution of said claim. She alleges that from May 31, 1904, when payment was refused, to the 2nd of May, 1906, when her mandamus suit was filed, the complainants did not ever impart to this defendant their readiness or willingness to institute a mandamus suit, or any other suit for the enforcement of her rights. On information and belief, she avers that at least one of the complainants did repeatedly assert that the remedy by mandamus was inapplicable and could not be maintained.

It is true that Emily E. Parish did employ counsel and attorneys without consulting or advising complainants for the further prosecution of the claim. She denies that everything needed to gain the case had been accomplished by the act of February 17, 1903, aided by the finding of the Auditor of the War Department, because same had been cancelled by the decision of the Secretary of the Treasury.

She denies that it is the intention of herself, her agents, or attorneys to ignore and refuse to recognize any valid claims against the estate of her testator, and denies that none of the claims filed and proved in the Probate Court have been paid in part, but on the contrary avers that all such claims have been paid and satisfied, and in consequence her account passed and approved. She denies that she or her brother are insolvent.

She further alleges that by the terms of the contract with said McGowan he agreed to diligently prosecute said claim to its final termination. She alleges that there was a breach of contract as to this by the said McGowan, and that the determination was one which failed, and it was left to others, having no connection with him, to prosecute said claim to a termination that was a success. That had said defendant known that she could rely on said McGowan to prosecute said claim to a final and successful termination, it would have been perfectly agreeable to her to have paid 15 per cent instead of what she did pay. But because said McGowan altogether ignored her wishes, interests, and duties and silently abandoned the cause he had agreed to prosecute, this defendant resorted to total strangers to take up an abandoned cause. Apparently, said complainants agreed with the Secretary that discretion was given to him to decide as he did. Certainly they took no steps to assert, still less to demonstrate, the contrary. Two years had passed and only one year more remained for any steps which could be taken for the assertion of any

right which she possessed, when, having received no advice, suggestion, or communication even from said McGowan or said Brookshire, by the advice exclusively of others she filed the petition for mandamus, which was rewarded finally with complete success. She, therefore, alleges that said complainants never gave, sought, 266 or pretended to give the consideration called for by his said alleged contract; that by failing in the important step of prosecuting said claim to its final determination, he disintitiled himself to compensation for prior services rendered under his alleged contract, if such were rendered, and is not entitled to anything for the final prosecution of a claim which he did not prosecute to its final determination.

Testimony was taken. On October 19, 1911, a final decree was entered sustaining the bill and directing the payment, after satisfying the costs out of the moneys held by the American Security and Trust Company to the complainants respectively the sum of \$18,135.39, with interest at 6 per cent per annum from the 7th of June, 1909, and that any sum so remaining after the discharge of said claims be turned over to the defendant as executrix.

This is not the case of a creditor's bill to enforce a lien created by a decree of court as was *Price v. Forest*, 173 U. S., 410. It is an original suit on written contracts with attorneys to prosecute a certain claim against the United States to final determination for stipulated fees equal to twenty per centum of the amount that might be collected, and with an express lien to secure the payment of the same. Setting out the contracts, the bill alleges the prosecution of the claim before Congress to the passage of a relieving act, the diligent but unsuccessful attempt to obtain payment under said act from the Secretary of the Treasury, and a readiness and willingness to continue the performance of the contract until prevented by the wrongful acts of the said claimant and of his executrix who succeeded to the legal control of the claim after the death of the claimant, December 26, 1904. Upon the allegations of the insolvency of the executrix and her intention to remove the funds from the jurisdiction of the court, an injunction to prevent her receiving the fund was obtained. It can not be controverted that contracts like those set out in the bill, in so far at all events as they attempt to assign, or create a lien upon a claim against the United States, are prohibited by section 3477, R. S., and thereby made absolutely void. *Nutt v. Knut*, 200 U. S., 12-21; *Bank v. Downie*, 218 U. S., 345. It was said, however, in *Nutt v. Knut*, *supra*, that the provision of a contract evidencing an agreement to pay the attorney a fixed portion of the sum that might be recovered through his services, might stand alone notwithstanding the illegality of the provision for the lien, such provision giving the attorney no interest in the claim itself and creating no lien thereon. That case was prosecuted to judgment in a State court. As stated in the opinion of the Supreme Court of the United States, on error to the State court: "No lien is asserted by the plaintiff in his pleadings. While the original petition asserted his rights to be paid in accordance with the contract, the plaintiff claimed, if he could not be paid under the contract, that he be compensated according to

the reasonable value of his services." The plaintiff had prosecuted the claim to final allowance, and appropriation for its payment. The question of jurisdiction in equity to entertain the case did not arise, and apparently could not have arisen under the procedure of the State. No such amendment was made in the case at bar. The complainants sued upon the contract as a whole, claiming the fee as fixed thereby, as well as the lien. Had there been an amendment abandoning the lien and relying on the quantum meruit solely, the equity court would have been without jurisdiction.

It is contended that the allegations of the bill are sufficient to show that complainants had an attorney's lien upon the fund finally adjudged to the claimants' executrix, which could be enforced by the equity court. The bill alleges that complainants rendered the services that procured the act of Congress and also made diligent efforts to secure payment under that act by the Secretary to the time of his final refusal; that they were ready and willing to continue the prosecution of the claim to final determination and could have done so had not the claimant during the remainder of his life, and his executrix thereafter, refused to continue their services. Assuming for the present that these facts were proved as alleged, the fact remains that after dispensing with their services the executrix employed other attorneys who instituted and prosecuted the mandamus proceedings which resulted in the final judgment, under a special contract for a liberal fee. The executrix had the right, nevertheless, to dispense with complainants' services at any stage of the proceeding and retain other counsel (*In re Paschal*, 10 Wall., 483); though she could not thereby defeat their right to compensation for the reasonable value of their services before performed. Contracts for contingent fees are not illegal and an attorney prosecuting a cause under such contract is entitled to a lien upon a judgment recovered by him therein as well as upon collections made by him thereunder; but the lien does not extend to a judgment recovered by other and independent attorneys without his cooperation. *In re Wilson*, 12 Fed., 235-237. In that case it was held in accordance with an able opinion of Judge Brown that an attorney had no lien upon a judgment in one cause for services rendered in another and related one. His conclusion was thus stated: "After an examination of the numerous authorities on this subject, English and American, I am satisfied, * * * that an attorney has no general lien upon an uncollected judgment for services in other suits, but only a particular lien for his costs and compensation in that particular case." See, also, *Mass. & South Const. Co. v. Township of Gills Creek*, 48 Fed., 139-147; *Foster v. Danforth*, 59 Fed., 750-751; *Adams v. Kehlror Milling Co.*, 38 Fed., 281-282. In the case last cited a judgment had been obtained in a State court, and the judgment on which the lien was claimed had been recovered in a suit to enforce the former judgment. The facts presented a stronger case than the one at bar. In the present case the Secretary had refused to perform the act of Congress, and without his favorable action the claim was uncollectable. Nearly two years afterward independent counsel instituted the litigation which resulted in the judgment compelling payment. There was, therefore, no attorney's lien on which to found jurisdiction in equity.

The allegation of the insolvency of the executrix and her intention to remove the fund from the jurisdiction upon its receipt, furnish no foundation for a creditor's bill to enforce a simple contract. They were pertinent allegations in the bill for the purpose of obtaining the injunction prayed. It was not a creditor's bill founded on a simple contract invoking the interposition of equity under extraordinary conditions to prevent certain and irreparable injury so as to bring it within some of the exceptional cases in which a creditor's bill has been entertained upon a simple contract unreduced to judgment. Had such been its character and avowed purpose it would seem that the complainants were not without adequate remedy in another branch of the Supreme Court of the District. The will of J. W. Parish had been probated in the Supreme Court of the District holding a special term as a probate court and was still in administration. The sole power of the executrix to demand the payment and to institute the action to enforce it was derived from the letters testamentary granted to her on the probate of the will. The complainants could have applied for relief to that court which, under the ample power conferred by the statute, could have required the executrix to give additional and sufficient bond for the protection of creditors, or else have revoked her letters and thus prevented her collection of the judgment. Code D. C., sections 263-296.

Ignoring the claim of the void contract lien there was nothing on the face of the bill to confer jurisdiction in equity. Hence the court might, in the exercise of its discretion and of its own motion, have dismissed the bill for want of jurisdiction, and should have sustained an objection thereto if presented. Were there nothing else in the case this court would in the exercise of its discretion under such conditions direct the dismissal of the bill.

It remains, therefore, to consider the effect claimed for the interlocutory decree entered by consent of the parties. The decree was entered before the answer was filed, and no objection was raised therein to the jurisdiction. There is no question but that one consenting to a final judgment or decree in a court having jurisdiction of the subject-matter will not be heard to complain of error therein on appeal or writ of error. *U. S. v. Babbitt*, 104 U. S., 737; *Nashville Ry. Co. v. U. S.*, 113 U. S., 261-266; *Gaus v. Goldenburg*, 40 W. L. R., 697. An interlocutory decree by consent may also be binding and work an estoppel in cases where it is expressly made for the particular purpose and to procure some benefit. *Re Met. Ry. Receivership*, 208 U. S., 90-110. But in that case, which was one for a receivership, the defendant for its own advantage consented to the appointment on a bill filed by simple contract creditors, and did not seek to avoid the consequences of its consent by which others were effected. The language of the court was elicited on a proceeding by one who attempted to intervene in the cause and had been refused leave.

The restraining order in this case stopped the payment of the entire fund of \$181,358.95 in the hands of the Treasurer of the United States. It may be readily inferred that the consent to the de-

cree was given to retain a sum sufficient to safely cover the full claim of complainants, namely, \$41,000, in order that the remainder of the fund might be withdrawn at once from the Treasury. It is true that the defendant profited by the decree modifying the restraining order and releasing the remainder. But that would seem no more than she was entitled to demand of the court in any event, for even if the complainants' lien had been valid and enforceable they could not insist upon retaining more, subject to the process of the court, than enough to satisfy their lien and the costs of suit. The suit was upon the contract, as we have seen, and to enforce the lien created thereby. It was upon that contract and lien that the equity jurisdiction was invoked and assumed; and it was upon the assumption of that jurisdiction that the interlocutory decree was founded.

The answer of the defendant filed after the entry of the decree, shows that she regarded the suit as based solely upon the entire contract. She attacked the contract as illegal and void and submitted that issue for determination. She also sought to avoid it by alleging the failure of complainants to prosecute the claim to final determination; and also charged its voluntary abandonment. She presented no objection to the jurisdiction and none was necessary under the allegations of the bill, as the case presented turned upon the validity of the contract and would be disposed of by its determination. Certain recitals of the decree supplemented by the answer would seem, however, to amount to a waiver of the question of jurisdiction to the extent that complainants might claim the reasonable value of their services, and such waiver would, under the circumstances, justify an appellate court in exercising its discretion in retaining the cause for hearing on its merits. *Reynes v. Dumont*, 130 U. S., 354-395; *Kilbourne v. Sunderland*, 130 U. S., 505-514; *Brown v. Lake Superior Iron Co.*, 134 U. S., 530-536; *Hollins v. Brairfield Coal & Iron Co.*, 150 U. S., 371-381; *In re Met. Receivership*, 208 U. S., 90-110; *Tyler v. Moses*, 13 App. D. C., 428-443. The recital of the decree is that the \$41,000 shall be held subject to the further order of the court, "subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and — respect of the matters described in the bill of complaint." The answer reciting the above proceeds as follows:

"This defendant is advised and being so advised charges that the utmost which either complainant could claim for legal services would depend upon their reasonable value; and that their reasonable value would depend upon what legal services, if any, have been rendered. In directing attention to the inhibition interposed by said section 3477 to the relief prayed for in the bill, viz, that the court decree that said Jonas H. McGowan 'has an equitable lien on said finding and award and on the moneys payable, and that may be paid thereunder to the amount and in respect of \$18,135.89,' the object of defendant is not to secure the transfer to another forum of any valid contention, which it is in the power of complainants to make under their alleged contracts, but simply to exhibit, as her duty requires,

the limitations imposed by law thereon, in whatever forum the same may be adjudicated."

Under the views expressed, this decree and pleading furnished a ground for amending the bill converting the suit into one
268 on a quantum meruit. No amendment was had, and the cause was heard upon the theory that the allegations of the original bill were sufficient for the purpose. While evidence was taken at length to show the character of the services rendered to the time of the rejection of the claim of the Secretary, there was no evidence of their reasonable pecuniary value. The sole reliance for proof is the express stipulation of the contract. The admissibility and sufficiency of this is rested on the opinion of the court in *Nutt v. Knut*, 208 U. S., 12-21. After holding that the contract for the lien was void, but that the agreement for the fee could nevertheless be enforced, it was there said: "Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the Government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation." The court was not then considering the evidence on which the demand was submitted in the court below. There is, moreover, an essential difference between the two cases. In that it appeared that the plaintiff had prosecuted the claim with diligence to final and successful determination. All that remained was to receive the money appropriated. The labor of the attorney was completely performed and nothing remained for him to do but to demand and receive his share of the second and final payment made to his client. Assuming that complainants were superseded in this case, without cause, by the defendant, yet the fact remains that the claim was still denied, and was not put in a situation for collection until some years thereafter. It was through the intelligent efforts and arduous labors of other attorneys that the action instituted by them resulted in forcing the final payment of the claim. As we have seen, a party may change his attorney at any time before the litigation shall have ended, remaining liable, of course, to the superseded attorney for the reasonable value of the services already performed by him. In *re Paschal*, 10 Wall., 483-496. But it does not follow that the terms of the original contract furnished the measure of the reasonable value of the services partly performed. Such a doctrine would throw upon the client the burden of showing that the services performed were not of the actual value of the contract stipulation. It has no logical or just foundation. These conclusions would require the decree to be reversed and the cause remanded so that the pleadings may be amended and proof introduced on the issue of reasonable value. But it would serve no useful purpose to prolong the cause should the evidence fail to show that the complainants performed their contract so far as permitted by the claimant and his executrix, and indicated their readiness and willingness to continue the same to the final determination of the claim.

The original contract was with Jonas H. McGowan who was thereby given control of the prosecution of the claim. An interest

of one-third in the fee contracted for was subsequently assigned by McGowan to complainant Brookshire. Later, another contract was entered into between Parish and Brookshire whereby the latter was to receive an additional fee of 5 per cent. It seems to be a settled rule of law that an attorney who is retained generally to conduct a cause is under obligation to conduct the proceeding to its termination. *Nicholls v. Wilson*, 11 M. & W., 106; *Tenny v. Berger*, 93 N. Y., 524-529. This, however, McGowan expressly promised in the concluding paragraph of his contract. The evidence shows that McGowan and attorneys acting under and in cooperation with him labored long and earnestly in procuring an acknowledgment by Congress of this ancient claim, during which period there was complete harmony with the claimant. McGowan, himself, drafted the bill which became a law February 17, 1903. Just as the troubles seemed to have ended, they began afresh. The act was an ambiguous one, and the Secretary of the Treasury held that it vested him with discretion to examine and pass upon the right of the claimant to an assessment of damages. Although complainants diligently prosecuted the demand before the Treasury Department, the Secretary rejected it on May 31, 1904. It appears that shortly after the Secretary's decision a conference was had—Parish being present—to consider what additional steps might be taken to prosecute the claim. Three plans were considered: mandamus to the Secretary, a rehearing before him, reference to the Court of Claims. Nothing was decided upon. Later, in August, 1904, Parish said he would like the opinion of some attorney not connected with the case. He produced an opinion, but what it was does not appear. It seems to have been given August 8, 1904. It was suggested that the opinion of other and more distinguished counsel be obtained; but none was had. The matter seems to have rested a while in this condition. Parish was then in Washington where he remained until his death, December 26, 1904. On August 16th, desiring to raise money on his claim, he wrote McGowan to that effect, saying that if given a free hand he had the prospect of raising money to meet pressing demands at a reasonable cost. He asked for the return of a power of attorney held by McGowan. The power of attorney apparently referred to is one given to McGowan on March 25, 1903, making him his attorney to prosecute the claim before the Treasury Department and conferring general powers of representation. McGowan wrote back from Ontario, under date of August 21, 1904, saying he did not have the paper with him, but consented to any arrangement Parish might make for a loan. It seems that Parish was negotiating with one Whitney, and under date of August 31, 1904, Mr. E. P. Morey, who had been associated with complainants, wrote Whitney that there was every reason to believe that if other plans failed in the next ninety days, at the next session of Congress a direct appropriation would be made for payment of the full amount due as found by the Auditor. Nothing apparently was effected in the matter of the loan. The next thing that occurred was the following letter from Parish, which was produced from the files of McGowan's letters by his partner, the witness Serven:

"COMMITTEE ON CLAIMS,
HOUSE OF U. S. REPRESENTATIVES,
WASHINGTON, D. C., Sept. 15, '04.

"Hon. J. H. McGowan.

"MY DEAR SIR AND FRIEND: Your letter of the 25th ult. received in due time and contents noted, which I answered best I could but have no answer thus far to hand and will repeat in substance what I wrote, to wit: You will remember before you left Washington for your summer respite, you said substantially that you had done your best to get the Auditor's report in my case paid by the Secretary of the Treasury, and failed, etc. 'that you turned over to me the case to be managed in the future and do whatever I deemed best, etc.'

"Sometime next Congress I propose to organize a practical method and resurrect the claim from its unfortunate condition, and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore I said that I would reimburse those who had advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit: 'that you would be glad and well satisfied to get the money advanced me' returned. My past record as to compensation—who had rendered me service you have not surely forgotten which was generous and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm who is doing business here and in New York.

"Yours hastily,

J. W. PARISH,
217 A Street S. E."

This letter either recited the truth as to McGowan's surrender of the case before going to Ontario, or a deliberate falsehood. A slight circumstance supporting its truth is the letter asking the return of the power of attorney and McGowan's consent thereto. Another circumstance is found in the testimony of McKee, an impartial witness, who had been journal clerk of the House of Representatives, and in the year 1904 had resigned to practice law. About a week before his death Parish asked witness to take up his claim and several conversations were had. Witness called upon McGowan and asked him who were the attorneys of record. McGowan said that he had prepared it and followed it up to the time it was rejected by the Secretary, and added: "I don't care who collects it, I want my fee out of it." If false, McGowan was under obligation to contradict it. It is probable that other counsel associated with McGowan were not aware of this letter; but whether so or not, they are bound by his actions. E. L. Morey, one of the associates, testified that he called at Parish's house in October, 1904, to make an appointment with him for a consultation in reference to further proceedings. Not finding him he left word for him to call at the office. Parish did

not come. The following letter was received by Parish from Morey, to which no response was made in any way:

"SUNDAY, October 9, 1904.

"DEAR MR. PARISH: I called at your house today, but failed to find you. I am extremely anxious to see you, as I have some very important news concerning your case, and, therefore, ask that you call at my office tomorrow morning without fail. However, if for any reason you do not care to call at my office, telephone me and I will meet you at any place you suggest.

"Yours truly,

E. P. MOREY."

The letter to McGowan, above recited, remained unanswered. If its recitals were true, no reply was necessary; if untrue it should have been replied to promptly. The parties apparently met no more. On November 19, 1904, the following letter was mailed to Parish and received by him:

"November 19, 1904.

"Mr. J. W. Parish, 217 A Street S. E., City.

"DEAR SIR: We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next, we shall proceed as we deem best under the ample authority which we have.

"Yours truly,

"J. H. MCGOWAN.

"E. P. MOREY.

"E. V. BROOKSHIRE."

Parish promptly replied to what he characterized as an "impudent and discourteous" letter, giving notice that he would not submit to methods which he called "bull dozing." There was also a sarcastic allusion to the ability displayed in the proceedings before the Secretary. Parish's letter of September 15th indicated that his plan was to apply for relief at the coming session of Congress. At any rate he began no litigation if he may have contemplated any. He died December 23, 1904, leaving a will but no property save the expectancy of this claim. The executrix took no substantial action looking to the collection of the claim, though she had some conversation with McKee and others relating to it, which resulted in nothing, until on November 5, 1905, she entered into a contract with Mr. Holmes Conrad for the prosecution of the claim. He and his associate, Mr. Robinson, filed the petition for mandamus against the Secretary of the Treasury on May 2, 1903. Defeated in the trial court and the Court of Appeals, they obtained a reversal of the adverse decisions by the Supreme Court of the United States on May 17, 1909. See *Parish v. McVeagh*, 214 U. S., 124.

The executrix knew the former history of the claim and that complainants were the attorneys engaged in it to the time of its failure in the Treasury Department, but she had no knowledge of

the written contracts. No legal steps had been taken by complainants under the ample authority claimed in their letter of November 19, 1904, before mentioned, before the death of Parish. Knowing of his death and the qualification of defendant as his executrix they gave her no notice of their contracts and their readiness to proceed with their performance with her consent. The counsel finally retained by her had no notice of complainants' contracts, and no offer of assistance was made to them.

The executrix could readily have supposed from her father's letter to McGowan, and the latter's failure to reply thereto, that he had regarded the prospect for the collection of the claim such as not worth further efforts on his part and was willing to let others undertake it. He said to McKee in December, 1904, that he did not care who collected it. That he also stated that he wanted his fee out of it is no importance. He was entitled to no fee unless he prosecuted the case to final determination. Nor was he entitled to have the

270 reasonable value of his services before rendered without showing his willingness and readiness to proceed diligently, and the rejection of such tender by the executrix. The burden was upon the complainants to show this tender of their services and there is no evidence of it. Now that the claim has been collected by others acting independently as attorneys for the executrix, it seems a great hardship to complainants to receive no compensation for the effective services that they rendered in obtaining the legislation on which the successful litigation was founded; but it is the result of their own action or inaction at the critical time.

Several questions of evidence were raised at the hearing relating to statements made by the deceased Parish. So far as those were testified to by one of the complainants they are inadmissible by virtue of the provisions of the Code (sec. 1064) and have not been considered. While there may be some doubt as to the competency of similar evidence given by the attorneys, who were associated with the complainants and under contract with them for participation in their fees, we have considered the evidence without passing upon the question of its admissibility.

For the reasons given we will reverse the decree with costs and remand the cause with direction to dismiss the bill. It is so ordered.

Reversed and dismissed.

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MONDAY, November 4th, A. D. 1912.

No. 2371, October Term, 1912.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, De-
ceased, and ELIJAH V. BROOKSHIRE.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court with direction to dismiss the bill.

Per MR. CHIEF JUSTICE SHEPARD,
November 4, 1912.

272 In the Court of Appeals of the District of Columbia, October
Term, 1912.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

versus

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, De-
ceased, and ELIJAH V. BROOKSHIRE.

Now come the appellees, Josephine P. McGowan, Executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire, by their attorneys and move the Court for a re-hearing and re-argument of the above entitled cause, decided November 4, 1912, in respect of the decision of the Court that the said appellees are not entitled to a decree in this cause as entered by the Court below or the payment to them respectively of the sum of \$18,135.39, with interest at six per cent per annum from the 7th day of June, 1909, and in respect of the decision of the Court that the cause should not be remanded so that proof might be introduced upon the issue of the reasonable value of the services for which claim is made, as suggested in the opinion of the Court.

In support of this motion the appellees call to the attention of the Court the great importance of the case not only to the appellees, who, in the words of this Court, "received no compensation for the effective services that they rendered," but also to all attorneys who may be employed in the prosecution of claims against the United
273 States; inasmuch as the decision and opinion of this Court may not under the statutes now in force be subject to review by appeal or writ of error.

In further support of this motion the appellees respectfully suggest to the Court that—

1. The Court erred in holding that the invalidity of the liens and powers of attorney attempted to be created by the McGowan and Brookshire contracts, by reason of Section 3477, R. S. U. S., made unenforceable, as between the petitioners and the respondent, the agreement of her testator to pay the petitioners a sum certain as compensation for their services, irrespective of the employment of other counsel in the case.

2. The Court erred in holding that Section 3477 of the Revised Statutes is available to a private litigant, defendant, as against the claim of a contract creditor, by reason of the fact that the contract creating the debt contained provisions for its enforcement inconsistent with that Section.

3. The Court erred in holding that a private litigant, who consents that a decree be entered by a Court of Equity upon a bill appealing for the protection of the Equity Court upon the existence of alleged facts showing no adequate remedy at law, sequestering a large portion of a fund for the payment of a debt, and reserving only a single question not affecting the jurisdiction of the Court, could thereafter invoke Section 3477 of the Revised Statutes as affecting the jurisdiction of the Court, or as affecting the measure of the plaintiff's recovery, the United States having no interest in the outcome of the suit.

274 4. The Court erred in holding that an attorneys' lien created by law in favor of the attorneys who procured the Act of Congress and the award of the Auditor for the War Department, on the proceeds of that Act and award, and to secure their compensation, was destroyed by the employment of other counsel to enforce that Act and Award in the proceeding terminating in *Parish v. MacVeagh* (214 U. S. 124).

5. The Court erred in holding that the creation of a statutory remedy in the probate court ousted the jurisdiction of equity to entertain the bill in this cause, there being no adequate remedy at law.

6. The Court erred in finding that the plaintiffs did not tender themselves to the appellant and the appellant's testator as ready and willing to perform such services as might be required of them, and in finding that the plaintiffs abandoned the performance of their contracts.

7. The Court erred in disturbing the findings of fact made by the trial Court, in that the appellate court disregarded as immaterial without adverting thereto in its opinion the finding of the Auditor for the War Department, which was made the basis for the mandamus proceeding allowed in *Parish v. MacVeagh*, 214 U. S. 124, and in that the appellate Court drew the conclusion of abandonment from the plaintiffs' failure to assert the powers apparently granted to them by their contracts while holding that said powers so granted were actually void under Section 3477, Revised Statutes, United States.

275 8. The Court erred in disregarding as immaterial the letter, dated January 31, 1905, written by McGowan, Morey and Brookshire to Messrs. Cole and Donaldson and Jesse E. Pot-

bury, attorneys of record for the respondent executrix, giving notice of the contracts and powers of attorney of the plaintiffs and requesting a conference, the contents of which letter were shown to have been duly communicated to their client the executrix.

9. The Court erred in refusing to consider the testimony of the plaintiff Brookshire upon the ground that it was inadmissible by virtue of Code Section 1034, whereas the said testimony was not objected to at the trial of this cause.

10. The Court erred in holding that the letter of September 15, 1904, from Parish to McGowan and McGowan's alleged failure to reply thereto were notice to and binding upon Brookshire, notwithstanding that Brookshire had a separate and independent contract with Parish.

And the appellees respectfully request the attention of the Court to the memorandum or brief filed herewith in support of this motion.

NATH'L WILSON,
J. J. DARLINGTON,
PAUL E. LESH,

Attorneys for the Appellees.

276 (Endorsed:) Court of Appeals, District of Columbia, October Term, 1912. No. 2371. Emily E. Parish, Executrix of Joseph W. Parish, Deceased, Appellant, vs. Josephine P. McGowan, Executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire. Motion for Rehearing and Brief in Support. Court of Appeals, District of Columbia. Filed Nov. 21, 1912. Henry W. Hodges, Clerk.

277 THURSDAY, November 21st, A. D. 1912.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE.

The motion for a rehearing in the above entitled cause was submitted to the consideration of the Court by Mr. Nathaniel Wilson, of counsel for the appellees, in support of motion.

278 MONDAY, December 2nd, A. D. 1912.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE.

On consideration of the motion for a rehearing in the above entitled cause, It is by the Court this day ordered that said motion be,

and the same is hereby, overruled. And it is further ordered that the mandate in said cause be and the same is hereby stayed until further order.

279 In the Court of Appeals of the District of Columbia, October Term, 1912.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE.

Now come the appellees in the above entitled cause, by their counsel, and appeal to the Supreme Court of the United States from the judgment entered by this Court in this cause on the 4th day of November, 1912, and pray that the same may be allowed and that the Court will fix and designate the penalty of the bond to be filed by the said appellees to operate as a supersedeas in respect of said judgment and further proceedings thereon.

NATH'L WILSON,
J. J. DARLINGTON,
Counsel for Appellees.

Dated, January 4th, 1913.

(Endorsed:) In the Court of Appeals of the District of Columbia. No. 2371. Emily E. Parish, Ex'c'x &c., Appellant, vs. Josephine P. McGowan, Ex'c'x &c., and Elijah V. Brookshire, Appellees. Appeal, application for allowance of appeal, and supersedeas bond. Nath'l Wilson, J. J. Darlington, Counsel for Appellees. Court of Appeals, District of Columbia. Filed Jan. 4, 1913. Henry W. Hodges, Clerk.

280

TUESDAY, January 7th, A. D. 1913.

No. 2371.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE.

The motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause was submitted to the consideration of the Court by Mr. Nathaniel Wilson, of counsel for the appellees, in support of motion.

281 In the Court of Appeals, District of Columbia, October Term,
1912.

No. 2371.

EMILY E. PARISH, Executrix of J. W. Parish, Deceased, Appellant,
vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan,
Deceased, and ELIJAH V. BROOKSHIRE.

Assignment of Errors.

Now comes the appellees in the above-entitled cause, Josephine P. McGowan, Executrix of Jonas H. McGowan, and Elijah V. Brookshire, appellants in the appeal taken herein by their solicitors, and respectfully show and allege that the final decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause December 4, 1912, reversing the final decision of the Supreme Court of the District of Columbia rendered in this cause on the 19th of October, 1911, was and is erroneous and against the just rights of the appellants, and they file herewith their assignment of errors, on which they will rely in the prosecution of their appeal from the decree of this Honorable Court of November 4, 1912, reversing the decree of the Supreme Court of the District of Columbia and directing the dismissal of the plaintiffs' bill of complaint in this cause, and they, the appellants, assign the following errors.

1. The Court of Appeals erred in adjudging and decreeing that the decision of the Supreme Court of the District of Columbia of October 19, 1911, be reversed, and directing the said Court to dismiss the bill of complaint.

2. That the Court erred in refusing to affirm said decree of said Court.

3. The Court erred in holding that Section 3477 of the Revised Statutes of the United States had any application to the
282 rights adjudicated by the decree from which the appeal was taken.

4. The Court erred in holding that Section 3477 of the Revised Statutes made void or unenforceable the contracts set out in the bill of complaint of the plaintiffs McGowan and Brookshire with Parish.

5. The Court erred in holding that Section 3477 of the Revised Statutes made void those provisions of the said contracts which fixed the amount of compensation to be paid plaintiffs for their professional services:

6. The Court erred in holding, on the one hand, that said contracts were invalid, and not binding the defendant's testator, Parish, because prohibited by Section 3477 of the Revised Statutes, and yet were valid and enforceable as to the plaintiffs McGowan and Brookshire.

7. The Court erred in holding that under the contracts of the plaintiffs with Parish their client, Parish, the defendant's testator, could dispense with the services of McGowan and Brookshire without cause, and thereby defeat their rights to the compensation specified in their contracts, and relegate them to a recovery upon a quantum meruit for the services performed before their services were dispensed with.

8. The Court erred in holding that the consent decree converted the suit into one upon a quantum meruit so as to require an amendment of the bill of complaint and prevent the granting of any relief without the amendment.

9. The Court erred in holding that the contracts of the plaintiffs do not fix the measure of their recovery.

10. The Court erred in holding that inquiry into the question of jurisdiction of equity as distinguished from jurisdiction at law was proper on this appeal from the decree of October 19, 1911, inasmuch as the decree of June 2, 1909, which was entered by consent and from which no appeal was or could be taken, necessarily adjudicated whatever such jurisdictional questions were involved.

283 11. The Court erred in holding that the statutory proceeding in the probate court of the District of Columbia constituted an adequate remedy which negatives the jurisdiction of equity to entertain a bill of complaint to protect creditors under the circumstances set out in this bill.

12. The Court erred in holding that the plaintiffs had no attorneys' lien or equitable right in the proceeds of the Parish claim.

13. The Court erred in holding that, despite the findings of fact made by the trial court, a letter written by the client, Parish, the defendant's testator, to one of the plaintiffs, his attorney, McGowan, and McGowan's consent that he, Parish, might raise money on his claim, despite McGowan's attorneyship, and McGowan's alleged statement, "I don't care who collects it, I want my fee out of it," constituted proof of abandonment of the claim and defeated a recovery of even the reasonable value of services theretofore rendered.

14. The Court erred in holding that the plaintiff Brookshire, who, the Court holds, was probably not aware of McGowan's actions, was bound by his actions, and was thereby likewise deprived of all rights of recovery.

15. The Court erred in holding that, despite the findings of fact made by the trial court, the burden of proof was upon the plaintiffs to show that they had made known their willingness to proceed with the claim, and that there was no evidence of this.

16. The Court erred in re-examining the facts of the case without considering the testimony of the plaintiff Brookshire as to statements made to him by the deceased, Parish, as to which statements, as appears by the record, notice of objection was made before the Examiner who took the testimony, but the objection was not made or renewed when the testimony was presented to the Court at the hearing.

NATH'L WILSON,
J. J. DARLINGTON,

Solicitors for the Appellees, McGowan and Brookshire.

284 (Endorsed:) No. 2371. Court of Appeals, District of Columbia. Emily E. Parish, Executrix of J. W. Parish, deceased, Appellant, vs. Josephine P. McGowan, Executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jan. 11, 1913. Henry W. Hodges, Clerk.

285 No. 2371.

EMILY E. PARISH, Executrix,
vs.
JOSEPHINE P. MCGOWAN, et al.

Appellees pray for an appeal to the Supreme Court of the United States basing their right thereto upon the ground that the construction of a law of the United States is drawn in question by the defendant.

The defendant relied upon Section 3477 R. S. as prohibiting the lien claimed by the plaintiffs, and on that rests the contention that the construction of a law of the United States is drawn in question.

The right to appeal is one of substance and not of mere form. The question of the validity of the lien is one that had been settled by the Supreme Court of the United States in construing Section 3477, and was no longer an open one. The construction of the Act could not, therefore, be drawn in question. *State of Kansas vs. Bradley* 26 Federal 289; *Harris vs. Rosenberger*, 145 Federal 449-452.

We are constrained to refuse the allowance of the appeal.

SETH SHEPARD,
Chief Justice.

(Endorsed:) No. 2371. Emily Parish, Executrix of Joseph W. Parish, deceased, Appellant, vs. Josephine P. McGowan, Executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire. Opinion on Motion for allowance of an appeal to Supreme Court of the United States, per Mr. Chief Justice Shepard. Court of Appeals, District of Columbia. Filed Jan. 13, 1913. Henry W. Hodges, Clerk.

286 MONDAY, January 13th, A. D. 1913.

No. 2371, January Term, 1913.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
Appellant,

vs.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased, and ELIJAH V. BROOKSHIRE.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause,

It is by the Court this day ordered that said motion be, and the same is hereby, denied.

Per MR. CHIEF JUSTICE SHEPARD,
January 13, 1913.

287 Supreme Court of the United States, October Term, 1912.

No. —.

JOSEPHINE P. MCGOWAN, Executrix of Jonas H. McGowan, Deceased,
and ELIJAH V. BROOKSHIRE,

vs.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased.

On consideration of the petition of the above-named Josephine P. McGowan, Executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire for the allowance of an appeal to this Court from the Court of Appeals of the District of Columbia in the above-entitled cause, and of the argument of counsel thereupon had, as well in support of as against the same,

It is now here ordered by the Court that said appeal be; and the same is hereby, granted, to operate as a supersedeas on giving bond in the sum of Three thousand dollars.

April 14, 1913.

A true copy,

Test:

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 2371. Supreme Court of the United States. October Term, 190-. Emily E. Parish, Executrix of Joseph W. Parish, deceased, Appellant, vs. Josephine P. McGowan, et al. Order Supreme Court U. S. allowing appeal. Court of Appeals, District of Columbia. Filed Apr. 16, 1913. Henry W. Hodges, Clerk.

288 Know all Men by these Presents, That we, Josephine P. McGowan, Executrix of the last will and testament of Jonas H. McGowan, deceased, and Elijah V. Brookshire, as principals, and Massachusetts Bonding and Insurance Company, a Corporation, as surety, are held and firmly bound unto Emily E. Parish, Executrix of the last will and testament of Joseph W. Parish, deceased, in the full and just sum of three thousand — to be paid to the said Emily E. Parish, Executrix as aforesaid, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixteenth day of April, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a Court of Appeals of the District of Columbia,

in a suit depending in said Court, between Emily E. Parish, Executrix of the last will and testament of Joseph W. Parish, deceased, as appellant, and Josephine P. McGowan, Executrix of the last will and testament of Jonas H. McGowan, deceased, and Elijah V. Brookshire, as appellees, a decree was rendered against the said Josephine P. McGowan, Executrix of the last will and testament of Jonas H. McGowan, deceased, and Elijah V. Brookshire, and the said Josephine P. McGowan, Executrix of the last will and testament of Jonas H. McGowan, deceased, and Elijah V. Brookshire having obtained an order allowing an appeal from the said decree and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Emily E. Parish, Executrix as aforesaid, citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Josephine P. McGowan, Executrix as aforesaid, and Elijah V. Brookshire shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPHINE P. MCGOWAN, [SEAL.]

*Executrix of the Last Will and Testament
of Jonas H. McGowan, Deceased.*

ELIJAH V. BROOKSHIRE. [SEAL.]

MASSACHUSETTS BONDING AND INSURANCE
COMPANY, [SEAL.]

By LEE B. MOSHER, *Attorney in Fact.* [SELL.]

[Seal of Massachusetts Bonding and Insurance Company.]

Sealed and delivered in the presence of—

FRENCH C. SIMPSON,

As to Josephine P. McGowan, Ex'c'x, &c.

PAUL E. LESH,

As to Elijah V. Brookshire.

Approved by—

EDWARD D. WHITE,

Chief Justice of the United States.

[Endorsed:] No. 2371. Emily E. Parish, Executrix of Joseph W. Parish, deceased, Appellant, vs. Josephine P. McGowan, et al. Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 16, 1913. Henry W. Hodges, Clerk.

289 UNITED STATES OF AMERICA, ss:

To Emily E. Parish, Executrix of the last will and testament of Joseph W. Parish, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days

from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Josephine P. McGowan, Executrix of the last will and testament of Jonas H. McGowan, deceased, and Elijah V. Brookshire are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 16th day of April, in the year of our Lord one thousand nine hundred and thirteen.

EDWARD D. WHITE,
Chief Justice of the United States.

Service acknowledged.

HOLMES CONRAD,
For Appellee.

April 16, '13.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 16, 1913. Henry W. Hodges, clerk.

290 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages numbered from 1 to 289 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Emily E. Parish, Executrix of Joseph W. Parish, deceased, appellant, vs. Josephine P. McGowan, Executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire, No. 2371, April Term, 1913, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 17th day of April, A. D. 1913.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the
District of Columbia.*

Endorsed on cover: File No. 23,643. District of Columbia, Court of Appeals. Term No. 150. Josephine P. McGowan, executrix of Jonas H. McGowan, deceased, and Elijah V. Brookshire, appellants, vs. Emily E. Parish, executrix of Joseph W. Parish, deceased. Filed April 19th, 1913. File No. 23,643.

JAN 2 1915

JAMES D. MAHER

CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 150.

JOSEPHINE P. MCGOWAN, EXECUTRIX OF
JONAS H. MCGOWAN, DECEASED, AND
ELIJAH V. BROOKSHIRE, APPELLANTS,

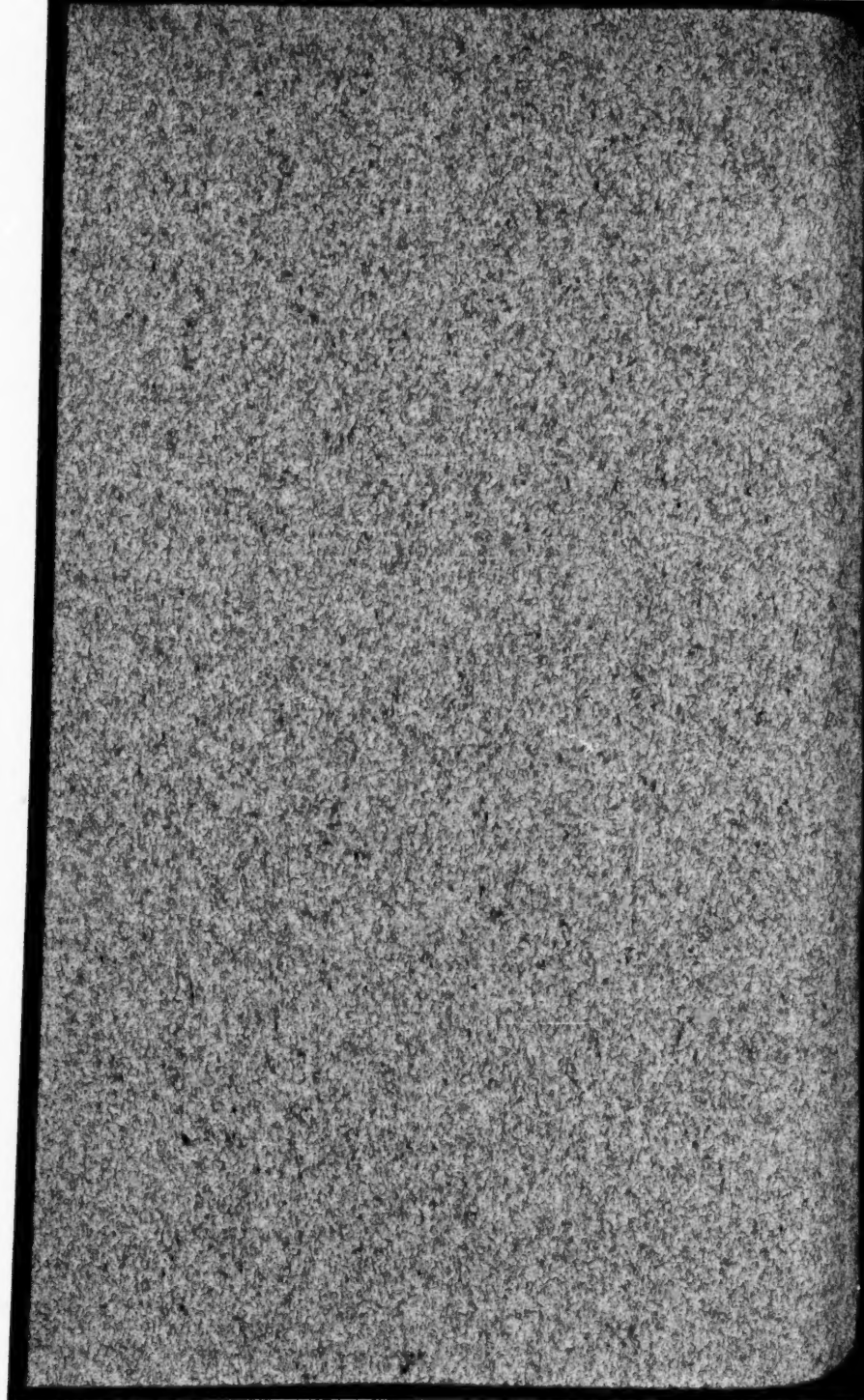
vs.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W.
PARISH, DECEASED, APPELLEE.

APPEAL FROM THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

NATHL. WILSON,
J. J. DARLINGTON,
CLARENCE R. WILSON,
Counsel for Appellants.



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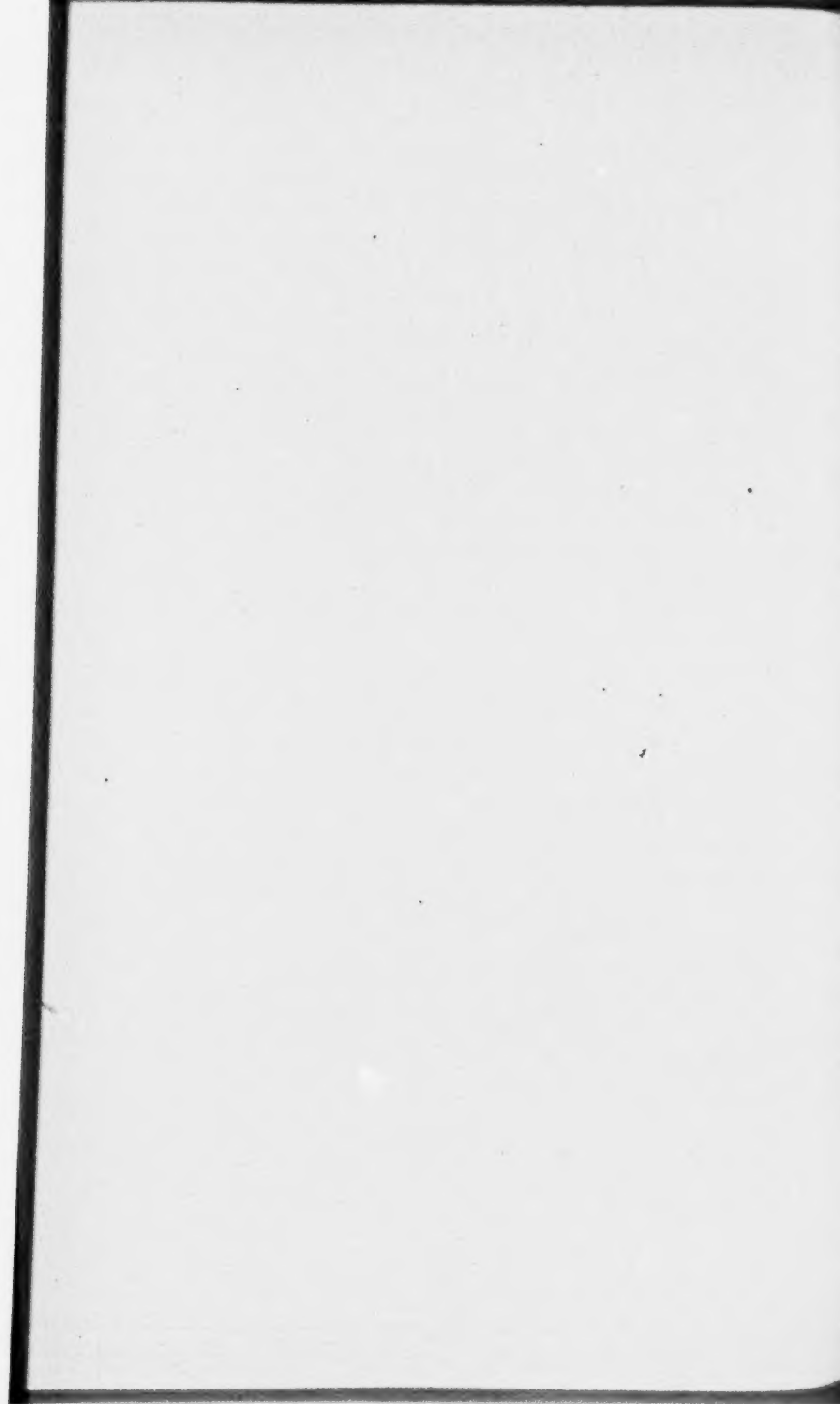
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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 150.

JOSEPHINE P. McGOWAN, EXECUTRIX ET AL.,
APPELLANTS,

vs.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W.
PARISH, APPELLEE.

**APPEAL FROM THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.**

BRIEF FOR APPELLANTS.

Preliminary Statement.

The present suit was begun in the Supreme Court of the District of Columbia, in May, 1909, after the decision by this Court in the case of Parish *vs.* MacVeagh, 214 U. S., 124, and when in pursuance of that decision a mandate was about to be issued directing the Secretary of the Treasury to issue a warrant in favor of the appellee as executrix of the last will and testament of Joseph W. Parish, for the sum of \$181,358.95 found to be due to him by the Auditor for the War Department, declared to be payable to his executrix by the judgment of this Court. The money for the payment

of the award was appropriated by the act of Congress, approved February 17, 1903, relating to the claim of Joseph W. Parish (32 Stats. at Large, p. 1612).

On the filing of the bill, and after the issuance of a preliminary restraining order, an interlocutory decree was entered by consent dissolving the restraining order, which had enjoined the appellee from applying for, demanding or receiving any order or warrant for the payment of the award, which restrained the Secretary of the Treasury, and the Treasurer of the United States from issuing any draft, check, warrant, or order to her therefor. By the terms of the consent decree, which dismissed the bill as to the Secretary and the Treasurer, the restraining order was dissolved as to the appellee—

“provided, however, and it is adjudged that in respect of the sum of forty-one thousand dollars and in respect of any warrant, draft or check that may be issued therefor . . . Emily E. Parish, executrix of Joseph W. Parish, deceased, is enjoined and prohibited from receiving any warrant or draft for said sum of forty-one thousand dollars (\$41,000), or any part thereof, from the Treasury Department or any official thereof, and from receiving said sum of money, or any part of it, and is hereby required and directed to make and execute a proper power of attorney authorizing and empowering Corcoran Thom, Vice-President of the American Security and Trust Company, to receive any warrant, draft or check that may be issued in respect of said sum of forty-one thousand dollars (\$41,000) and to endorse the same for her and in her name as executrix of the said Joseph W. Parish, deceased, and to receive and collect the proceeds thereof, and forthwith to deposit the same when received

with the American Security and Trust Company, of Washington, D. C., to the credit of this cause and subject to the further order of this Court herein and *subject to the determination by this Court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint.* Said American Security and Trust Company shall hold the said sum of forty-one thousand dollars (\$41,000), so deposited with it, without being entitled to compensation for holding or disbursing the same, and shall pay interest thereon at the rate of two per cent per annum from the date of its deposit as aforesaid, the said sum and the accrued interest thereon to be subject to the order and decree of this court in this cause" (Rec., p. 13).

In accordance with this interlocutory decree, \$41,000 was deposited, and remains with the American Security and Trust Company to the credit of the cause and subject to the ultimate final order of the court therein.

Upon the death of the plaintiff, Jonas H. McGowan, his executrix, Josephine P. McGowan, was substituted in his stead, and thereafter the defendant, Emily E. Parish, executrix, filed her answer (Rec., pp. 15-22), which contains the following admissions in respect to the consent interlocutory decree above referred to:

"This defendant has, however, joined in the consent for a decree in this cause, which, by consent of the parties hereto, was passed by the court, whereby the sum of forty-one thousand dollars,

or a sum far more than enough to satisfy *in toto* the whole claim made by both complainants, was directed to be deposited 'with the American Security and Trust Company to the credit of this cause, and subject to the determination by this court in 'this cause, *whether any amount, and, if so, what amount is justly due* the complainants, or either of them for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint" (Rec., pp. 16, 17);

and that, in setting up in her answer the inhibition of Section 3477 of the Revised Statutes of the United States against the assignment of claims against the United States, her object was, not to secure the transfer to another forum of any valid contention which it was in the power of the complainants to make under their contracts, "but simply to exhibit, as her duty requires, the limitations imposed by law thereon, in whatever forum they might be adjudicated."

The answer, in short, consented, as the appellee had already done by her assent to the interlocutory decree, to the ascertainment, in this cause, of the validity and amount of the complainants' claims, and admitted, further, that the fund of \$41,000 was deposited with the Court by her consent, for the express purpose of paying whatever amount it should be determined in the cause, was "justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and in respect of the matters described in the bill."

Testimony was duly taken in the cause, and on the 19th

of October, 1911, a decree was entered by the Supreme Court of the District of Columbia adjudicating that there was justly due, and that there be paid out of the money so deposited subject to the order of the court, to Josephine P. McGowan, executrix, for the professional services performed by Jonas H. McGowan, described in the bill of complaint, \$18,135.89, with interest at 6 per cent from June 7, 1909, and to Elijah V. Brookshire a like amount, and that the remainder of the amount on deposit, after the payment of the costs of the cause be paid to the defendant, executrix, or her attorneys of record (Rec., pp. 236-8).

From this decree the present appellee prosecuted an appeal to the Court of Appeals of the District of Columbia, which reversed the decree of the court below, and directed dismissal of the bill, from which decree an appeal to this Court was refused by the Court of Appeals. Application was then made to this Court for the allowance of an appeal and was by this Court granted.

McGowan vs. Parish, 228 U. S., 312.

The facts and issues involved in this appeal are there so clearly and succinctly stated that we here set forth a portion of that opinion.

"In a controversy with the United States, the executrix of Joseph W. Parish ultimately recovered a judgment for a large sum of money. *Parish vs. MacVeagh*, 214 U. S., 124. Claiming to be entitled to a lien or liens upon the proceeds of the claim, and to be the equitable owners of one-tenth of the amount awarded, because of services rendered as attorneys at law, under express contracts made with Joseph W. Parish, a

suit in equity was commenced in the Supreme Court of the District of Columbia, by Jonas H. McGowan and Elijah V. Brookshire against the executrix of Parish and the Secretary of the Treasury and the Treasurer of the United States to enforce said alleged lien or liens. A restraining order issued, but before answer an interlocutory decree was entered by consent of the defendant executrix, by which the restraining order was dissolved and \$41,000 of the sum owing by the United States to the Parish estate was collected and deposited with a trustee 'to the credit of this cause and subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount, and if so what amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for or in respect of the matters described in the bill of complaint.' The case thereafter proceeded solely against the executrix of Parish. Soon afterward McGowan died and his executrix was substituted. The defendant executrix answered, and the objections therein raised to the case made by the plaintiff were thus summarized by the judge before whom the case was ultimately heard:

"(1) That the plaintiffs' claims, if any, are barred by their failure to have the same passed and approved by the Probate Court within the time limited by the statute.

"(2) That the lien asserted by the plaintiffs is in violation of the Revised Statutes, Section 3477.

"(3) That even taking the contract of McGowan as it read, he had not fulfilled its condition, and is therefore entitled to nothing.

"(4) That the plaintiffs totally abandoned the prosecution of the claim, and voluntarily relinquished all rights they may have had under their contracts.

"(5) That in any view of the case the plaintiffs are [entitled to nothing more than the reasonable value of their services." . . .

"The trial judge disposed of the case in an elaborate opinion. Considering whether the lien asserted by the plaintiff was in conflict with Rev. Stat., Section 3477, it was held that all questions on that subject had been waived by the consent to the interlocutory decree, which reserved only the question of indebtedness and the amount thereof. The case was deemed to be analogous to that presented in *Price vs. Forrest*, 173 U. S., 410, 423, 424, where the scope and effect of Rev. Stat., Section 3477, was considered; and it was in effect decided that the statute would not be contravened by adjudicating upon the alleged contract rights of the parties in respect to the fund on deposit. On appeal the Court of Appeals reversed the decree of the Supreme Court, and among other things explicitly decided that the contracts relied upon were repugnant to Section 3477, and were absolutely void. It was, however, also held that, putting aside the question of contract lien and assuming that there was an agreement to pay a contingent fee, no lien operative upon the fund existed for such fee, because the judgment for the claim against the United States had been recovered by other attorneys acting independently of the complainants. Thus reaching the conclusion that as the result of the provisions of the statute there could be no lien, and there was, moreover, none,

viewing the case independently of the statute, and hence, no valid ground of equity jurisdiction, it was substantially decided that from the point of view of the alleged contract, and the right to the fund asserted to arise from it, the court was without power to interfere. Considering the interlocutory decree, and the agreement by which it was rendered it was in effect determined that it must be treated as having been entered subject to the right of the defendant to challenge, in virtue of the statute, the existence of the alleged lien, and therefore as the result of the construction given to the statute, at the instance of the defendant, the interlocutory decree could have no greater effect to establish the lien asserted than did the contract itself. Although it was thus concluded that as by virtue of the statute invoked by the defendant there was no lien and no jurisdiction, it was nevertheless decided that in view of the recitals in the answer that the agreement leading up to the interlocutory decree was equivalent to the consent by the parties that the court decide the case, not upon a question of contract or the right to a lien arising from it, since that was disposed of by the statute, but by way of *quantum meruit*. Coming to examine that question, it was held that by inaction or neglect, the plaintiffs had lost their rights, if any, to recover on a *quantum meruit*, as the result of the inaction or neglect, as other attorneys had been employed and had recovered the judgment upon which the money had been collected. (40 Wash. Law Rep., 726.) A decree of reversal was entered and the cause was remanded, with directions to dismiss the bill. Application was then made to the Court of Appeals for the allowance

of an appeal to this court "upon the ground that the construction of a law of the United States is drawn in question by the defendant."

"The appeal was refused; the court, in a memorandum opinion, after reciting the fact of the making of the application, saying:

"The defendant relied upon Section 3477, Rev. Stat., as prohibiting the lien claimed by the plaintiffs, and on that rests the contention that the construction of a law of the United States is drawn in question."

Statement of the Facts.

On March 5, 1863, the United States Government entered into a contract with Joseph W. Parish, appellee's testator, for delivery at Memphis, St. Louis, Cairo, and Nashville, of all ice which would be required by the Government during the remainder of that year. On March 25th, Parish was instructed to deliver 30,000 tons of ice under his contract without delay, and was proceeding to execute the order, when, six days later, the surgeon-general suspended the order until further instructions, which order of suspension was never recalled. In a suit in the Court of Claims, of which suit Parish *vs.* United States, 100 U. S., 500, represents a phase, Mr. Parish recovered \$10,444.91 (16 Ct. Cl., 642), and by act of Congress of February 20, 1886, he received the further sum of \$58,341.85, both of these payments being merely for reimbursement, without allowance for profits, of the moneys actually expended by him in preparing to perform his contract, pursuant to the order of March 25,

1863. In *United States vs. Behan*, 110 U. S., 338, this Court laid down the rule, more liberal than that which had been recognized in *Parish vs. United States*, 100 U. S., 500, that one entering upon the performance of a contract, incurring expense, willing to perform, but prevented from preformance by the other party, is entitled to recover such profits as would have been the direct fruits of the contract. For many years following this last-cited decision, Mr. Parish engaged persistently but ineffectually in endeavoring to procure from Congress further relief, to the extent of the profits of which he was deprived by the suspension of the order to deliver, in the course of which efforts he had retained many years before (Rec., pp. 25, 51, 86) the services of the late Jonas H. McGowan, a lawyer of eminence and one of the original complainants in the bill. On August 4, 1900, the contract with Mr. McGowan, set out at pages 2 and 3 of the record, was entered into, whereby, in consideration of professional services rendered and to be rendered by him and by others whom McGowan might employ in the prosecution of the claim, Parish bound himself and his personal representatives to pay a fee equal to 15 per centum of whatever might be awarded or collected on account of the claim, McGowan to have control of its prosecution to its final determination, the agreement not to be affected in any particular by any revocation of the authority granted to McGowan or by services rendered by others, McGowan agreeing to prosecute the claim diligently and to the best of his legal ability to its final determination.

Pursuant to the authority thus conferred upon him by

the contract above mentioned to employ others in the prosecution of the claim, McGowan engaged the services and assistance of the appellant, Elijah V. Brookshire, also a lawyer, and by the contract of December 3, 1902, which appears at pages 3-4 of the record, transferred to him one-third of whatever money might be realized by McGowan under his contract with Parish, conditioned upon the passage of the bill pending at the then present session of Congress, in aid of which bill Mr. Brookshire was then already contributing his services at the instance of Parish, who, as early as the summer of 1900 (Rec., pp. 24-5), had also sought the assistance of Mr. Brookshire in the prosecution of the claim subject to the approval of Mr. McGowan (Rec., pp. 24-26), the character and extent of whose services, from and after December, 1901, are summarized at pages 26-7, 67 et seq., of the record. On January 20, 1903, the contract between Parish and Brookshire which appears at pages 27-8 of the record was executed.

The consideration of this last-named contract purports to be "for value received and for legal services hereafter rendered and to be rendered," etc. As intimated in the opinion of the trial court (Rec., p. 236), the word "hereafter" is very probably a clerical error for "heretofore;" but, whether so or not, the words "for value received" sufficiently express the consideration of the services which the testimony shows, without dispute, had already been rendered by Mr. Brookshire.

Thereafter, on February 17, 1903, the act for the relief of Mr. Parish was finally passed (Rec., p. 5), in effect directing the Secretary of the Treasury to make a full and

complete examination into the claim, to ascertain the full amount which would have been paid to Parish if his contract had been carried out without change or default by either of the parties thereto, under the rule of damages laid down in the Behan case and in accordance with the facts collected by the Court of Claims, and to pay to him such balance as should be left after deducting from such amount all payments which had already been made to him, the act further appropriating such moneys as should be sufficient to pay the balance thus to be ascertained.

Promptly following the passage of this act the claim was diligently prosecuted before the Secretary of the Treasury by Messrs. McGowan and Brookshire, aided by Mr. Ellwood P. Morey, a lawyer whom Brookshire employed to assist him in the matter under an agreement to share with him the compensation which Brookshire should receive under his contracts with Parish and McGowan.

As early as March, 1903, or within a month after the passage of the act, they filed a brief with the Auditor of the Treasury for the War Department to whom the matter had been referred by the Secretary of the Treasury for ascertainment of the amount due Parish pursuant to the terms of the statute, before which officer and before the Law Board of his office numerous hearings were had, arguments made and briefs filed (Rec., pp. 28, 29, 39, 70, 84 et seq.), resulting in the finding, on August 11, 1903, of the sum of \$181,358.95 due, "as shown in the following statement and settlement certificate No. 23729, transmitted to the Secretary of the Treasury for pay-

ment" (Rec., pp. 220, 258). Instead of making the payment thus found due by the accounting officer, in obedience to the act, the Secretary of the Treasury intervened and referred the case to the Comptroller of the Treasury, before whom, again, Messrs. McGowan and Brookshire, aided by Mr. Morey, made frequent appearances and arguments and filed a number of briefs (Rec., pp. 30, 31, 40 et seq., 71), the hearing before the Comptroller, however, resulting in a finding by him that nothing was due Parish. The matter was then referred to the Solicitor of the Treasury Department, who reported adversely, and finally was heard before the Secretary himself, Messrs. McGowan, Brookshire and Morey again making repeated appearances and arguments, accompanied by written briefs upon the numerous objections raised. On May 31, 1904, the Secretary of the Treasury, also decided against the claim. The labor and services performed and rendered before these various tribunals were being shown by the evidence until further proof upon the subject was dispensed with by the statement of the counsel for appellee, "We don't question all those services at all" (Rec., pp. 25, 31, 67-71).

Soon after the Secretary of the Treasury's decision, a conference was held between McGowan, Brookshire and Morey at which the question of mandamus proceedings, or of an application to the Secretary of the Treasury for a rehearing, or of reference to the Court of Claims was discussed, but no definite conclusion was reached because of the absence of Mr. Parish (Rec., p. 32). This conference was followed in a few days by another, at which Parish was present, and at which these several

methods of further procedure were talked over with him, followed by another conference, about a week later, at which McGowan advised immediate application to the local courts by mandamus proceedings to recover the amount due, but from which meeting, Parish went away without consenting to any particular line of action. A few weeks later, Parish stated he would like the opinion of an attorney who had had no prior connection with the case, in reference to mandamus proceedings, and did not return to the offices of his attorneys, although repeatedly sent for by them, until the following August or September, when he came bringing an opinion by an attorney, advising that mandamus would not lie (Rec., p. 32), on which occasion Parish stated that he would not give his consent to mandamus proceedings, after which time his attorneys found it impossible to have any conference with him, notwithstanding frequent attempts upon their part to secure an interview (Rec., pp. 32-34).

On August 16th, Parish wrote McGowan that it was necessary for him to raise some money; that his only asset was his claim; that, if given a free hand, he had good prospects to raise sufficient money for present pressing demands, and asked if McGowan would not return his power of attorney in the case, assuring him that there was no thought of not paying him for the services he had rendered and the moneys he had advanced as soon as the claim should be paid. The letter contained no intimation of any purpose to discontinue the services of either Mr. McGowan or Mr. Brookshire. This power of attorney, which was dated March 25, 1903, and contained no reference to or bearing upon the contract

between the parties, will be found at page 215 of the record. McGowan, who was in Canada, when the Parish letter of August 16, 1904, reached him, replied that he did not have the power of attorney with him, that Parish might make any arrangements for a loan that he might deem best, and that McGowan hoped to be back before a great while (Rec., p. 89).

Having by means of this alleged prospect of being enabled by its possession to borrow money, obtained from Mr. McGowan his consent as above, Parish next, on September 15, 1904, wrote McGowan a letter, claiming that McGowan had turned over the case to him to be managed in the future and to do whatever to Parish seemed best, promising him that he would reimburse those who had advanced money, stating that McGowan had said to Brookshire that he would be glad and well satisfied to get the money advanced him returned, but that he, Parish, would do much better for him than that, etc. (Rec., pp. 89-90). These letters are relied upon on behalf of the appellee as proof of abandonment of the prosecution of the claim by McGowan, regardless of its inconsistency with the Parish letter of August 16th, above referred to, asking return of the power of attorney upon a wholly different ground, the fact that, when the Parish letter of September 15, 1904, came to his hands, McGowan declared, "after working on it for all these long years, any man that would abandon the case when it was so near the finish of it, certainly must be a fool" (Rec., p. 91), and the fact that, the efforts of Brookshire and Morey to secure an interview with

Parish having failed, he united with them in the following letter of November 19th:

"DEAR SIR: We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next, we shall proceed as we deem best under the ample authority which we have.

Yours truly,

J. H. McGOWAN.

E. P. MOREY.

E. V. BROOKSHIRE."

(Rec., p. 35).

In reply to this letter, Parish wrote under date of November 22, 1904, as follows, his letter, as will be seen, making no pretense of any understanding upon his part that the attorneys, or either of them, had agreed to abandon or retire from the case:

"GENTLEMEN: Your impudent and discourteous letter of the 19th instant, received yesterday. Contents noted. I hereby give you notice that I will not submit to any such 'Bulldozing' methods as you propose in your letter. You gentlemen failed to materialize your wonderful talent to get Mr. Shaw to pay my claim. There is no evidence that your ability and knowledge has improved it in any way. Your letter shows a spirit of imaginary resentment, and should you proceed to carry out your infamous threats, you will be met by a competent representative, who will no doubt advise you to go slow for the next year or two.

Yours truly,

J. W. PARISH."

To Messrs. J. H. McGowan, E. P. Morey, E. V. Brookshire" (Rec., pp. 35-6).

Further efforts of the attorneys to secure an interview with Mr. Parish are shown at pages 48-50, 44-5, 114.

Mr. McGowan's death before the taking of the testimony had been entered upon rendered it, of course, impossible to furnish further evidence of his own efforts to reach Parish, beyond the fact that, at least as early as October 9, 1904, or within ten days of his return to Washington, he sent Morey to Parish's residence to see if it were possible to have a further conference with him in reference to the further conduct of his case (Rec., p. 44), when, Morey, not finding Parish at home, wrote him a letter asking him to call (Rec., p. 114), which request was not complied with (Rec., p. 45).

Mr. Parish died December 24, 1904. About a week previous to his death, he approached Thomas H. McKee, a lawyer, and said to him he would like him to take charge of his claim against the Government, and left papers with him relating to the case (Rec., p. 119). "Immediately after his death," McKee testifies, "the same evening or the following evening, his daughter sent for me, and asked me to come to the house. . . . At that time, she asked me to take the case and proceed with it. . . . (Rec., pp. 178-179). "I suggested to them that we go to Judge Cole's office . . . that I would like to have Judge Cole retained" (Rec., p. 179). Mr. McKee, Miss Parish, and Grant Parish went to Judge Cole's office, but Judge Cole was busy, stated he could not see them, and requested them to call again. Judge Cole died within a short time afterwards (Rec., p. 180)." The firm of Cole & Donaldson and Mr. Jesse E. Potbury were attorneys of record and represented Miss Parish in

the probating of the will (Rec., pp. 97, 107, 214), the ~~ice~~ claim being the only asset of the Parish estate.

Some negotiations took place between Messrs. Cole and Donaldson and Messrs. McGowan, Brookshire, and Morey (Rec., pp. 36-7, 102) looking to their joint prosecution of the claim (pp. 36-7), which negotiations were antagonized by Grant Parish (see his correspondence with Judge Cole, Rec., pp. 104-6, and his letter to Mr. Potbury, Rec., p. 106), and were terminated by the death of Judge Cole. Mr. Brookshire saw Mr. Grant Parish, appellee's brother, who lived in the same house with her, with whom she consulted about the case (Rec., pp. 137-8), and who represented her in arranging for interviews with her counsel about it, and received from him, under date of February 13, 1906 (Rec., p. 65), a communication, as follows:

"I address you as one of the heirs of the estate of the late J. W. Parish, in reference to the numerous conferences you have had with me in my office, relative to the prosecution of the claim of my father's estate against the U. S. Gov., etc.; I have given your statements considerable consideration, but after a cool and impartial analysis of the entire subject, I find myself most emphatically against any change of proceedings inaugurated by my father after the Shaw decision and before his death. We have it in our father's own handwriting (in the flesh and not in the spirit), that he did not propose any further alliance with either one, or collectively; the att'ys. whose names adorn the briefs and who mutilated and made impossible to recover what was due him, as stated by the Auditor of the Treasury.

As one of the heirs I would oppose and contest to the bitter end and the last ditch with the last cartridge gone, any change from my father's plan of action, in his own handwriting, as we found them at the time of his death.

Yours truly,

GRANT PARISH."

One of the principal reasons, apparently, for employing other counsel after the death of Mr. Parish was the existence of an earlier, outstanding will (page 107) in which McGowan was named as one of the executors, referred to (Rec., p. 104) in McGowan, Morey, and Brookshire's letter to Cole & Donaldson (page 106). The will, displacing Mr. McGowan as executor and naming appellee in his stead, was executed October 24, 1904, nearly a month before the breach between them represented by the letters of November 19 and 22, *supra*.

After the death of Judge Cole, the further prosecution of the Ice Claim was placed in the hands of Holmes Conrad, Esq., without notice to or communication with the former attorneys. Appellee testifies, apparently as an attempted excuse for her action, that she never heard of any contract between her father and Messrs. McGowan and Brookshire until after this suit was filed (page 116), though she admits, on the same page, that she knew they were her father's attorneys in prosecuting the claim. She had talked with Morey about the case in the summer of 1903, at Harper's Ferry (Rec., pp. 38, 148-9), the Ice Claim being the principal topic of conversation at the Hill Top house there, at which they were stopping (Rec., pp. 50-1). They further discussed it in her presence

at Ocean Grove (p. 44), and Mr. Morey had delivered to her personally, at her house, a message to her father, in October, 1904, that Mr. McGowan was anxious to see him and with the request that he would call either at the offices of Brookshire and Morey or at McGowan's office (Rec., p. 48).

Upon cross-examination, she admits knowledge that Mr. McGowan was her father's attorney in the prosecution of the Ice Claim case in the year 1903 (Rec., pp. 115-16, 18); that she knew McGowan advanced \$25 per week, during the summer of 1903, for the board of herself and her father, which she "had no right to repay," it "was not my debt" (Rec., p. 127); that, when an officer came to serve her with the summons in this case, she met him at the door and told him she was not Miss Parish, and that she was subsequently served on a street car after declining to admit her identity (pp. 143-5); she had no idea, within \$500 or \$1,000, of how much money McGowan's advances amounted to; after receiving the proceeds of the claim, she made no inquiry of McGowan during his life, or of his widow or daughters since his death—"the debt is not mine" (Rec., pp. 151-2); that she knew Mr. Brookshire (Rec., p. 153), had no recollection of discussing with him and her brother, in October, 1902, the fee which should be paid to Mr. Brookshire for the services he was about to render to her father in prosecution of his claim (Rec., pp. 154-5); she never received from him any advances of money, either directly or indirectly, and is unable to account for the statement of her father's of January 22, 1903, to the contrary effect (pp. 155-6); she knew that Mr. Brook-

shire and Mr. McGowan were her father's attorneys (116); that Mr. Brookshire was his attorney only in the Ice Claim and not in any other matter that she knew of (pp. 155-7). She knew that her father had no income except the moneys advanced by McGowan, and that he had no property or prospects of repaying that money except through the Ice Claim (pp. 157-61); that, in her testimony-in-chief as to what "we" did in respect to the Ice Claim after her father's death, she referred to her brother Grant Parish and herself (Rec., p. 162); after her father's death, "we," her brother and herself, did nothing with the claim for a long time, thinking that it was dead, and did nothing until she approached Judge Cole, and she did not speak to Mr. McKee about prosecuting the claim within a week of her father's death; she did ask her brother Grant to call on Major Conrad and ask him if he would look into the case (pp. 163, 166); she recognized on the street car the man who had come to her house with Mr. Morey, had asked for her, and was told by her that she was not Miss Parish, and that she refused to tell him on the street car whether that was her name (Rec., p. 144); she had heard of Major Conrad before she approached him about the claim; she did not consult Mr. McGowan, who had charge of it, because she supposed his services had ended with Secretary Shaw's decision, and he had never approached her, though admitting that neither Judge Cole nor Major Conrad had approached her; that she thought Mr. McGowan's services were ended and she could employ what counsel she wished, although she knew McGowan had advanced her father money, that he and Brookshire

were associated with the claim (Rec., pp. 168-9), that it was through them that the act of Congress was passed (Rec., p. 169), and that they had charge of the claim when it was examined by the auditor, and she had never met Mr. Cole or Mr. Donaldson before she went to their offices (Rec., pp. 168-70). Mr. Thomas H. McKee, called as a witness on behalf of appellee, testified, that in the winter of 1904-5 appellee's testator asked him to take charge of the Ice Claim and left with him a bundle of papers relating to it; that he died a few days afterwards, and that immediately after his funeral his daughter, the appellee, asked witness to look thoroughly into the matter with a view of taking it up; that after being spoken to by Mr. Parish about it, he inquired of Mr. McGowan what the status of the case was and who were the attorneys of record, to which McGowan replied that he had prepared and followed it up until its rejection by the Treasury Department, and that "I don't care who collects it, I want my fee out of it" (Rec., pp. 177-8). He states at page 179 that both Grant Parish and his sister were present at his interview with the latter. This interview with McGowan, a few days before the death of Parish, was necessarily after the open breach between Parish and the appellants, represented by the letters, *supra*: pp.

Mr. Potbury was attorney of record for the estate of Joseph W. Parish and so continued until the distribution in the Probate Court, after the final decision in this Court (Rec., pp. 107-109). Grant Parish consulted him before his father's death (Rec., p. 108). Potbury knew McGowan Brookshire, and Morey were in the case from conferences

with Joseph W. Parish, with Miss Parish and with Grant (Rec., p. 110). He ceased to be counsel in the ice claim after it was placed in Mr. Conrad's hands (Rec., p. 111), but prepared the contract for the latter's employment (p. 110). Grant knew of the McGowan and Brookshire contracts, as shown by his "Thursday Eve" letter, at page 106 of the record, and it was he who placed the case in Conrad's hands (Rec., pp. 110, 111). Grant Parish lived with his father and sister until the death of the former (p. 115), with the latter afterwards, and had an equal interest with her in the ice claim (p. 64); he was bitter towards McGowan and Brookshire, and especially so towards Morey (Rec., p. 110). He lived with his sister, the appellee (Rec., p. 115). The witness McKee testifies, at page 179 of the record, that both Grant Parish and his sister were present at the interview with him, a few days after the death of Joseph W. Parish, and in answer to the question, "Were the former attorneys mentioned at all—Mr. McGowan and Mr. Brookshire?" he answered, "O, I think so; I think I talked freely about them" (Rec., p. 179).

Mr. Brookshire testified that in October, 1902, he called at the Parish home at the written request of Grant Parish; that a discussion took place between himself, Grant Parish, and the appellee in regard to the compensation Mr. Brookshire should receive in connection with the ice claim, and that he saw Miss Parish at her home in June, 1903, at which time, she and her brother desired to know why McGowan, Brookshire, and Morey were unable to come along more rapidly with the case in the Auditor's office and were told by him

that they were doing the best they could to get a speedy consideration (Rec., p. 189).

On May 2, 1906, the appellee, by counsel retained by her, filed in the Supreme Court of the District of Columbia a petition for mandamus against the Secretary of the Treasury (Rec., p. 243), summarizing the history of her testator's ice claim, alleging that the act of February 17, 1903, was "a plain, unambiguous direction to the Secretary of the Treasury to pay the claimant an amount which would be rendered certain upon the statement of the account by the proper Government accountant," that the statement of the account by the Auditor under the act "is so clear in itself as to call for no aid or argument," that the Auditor had sent to her testator a statement that the claim had been examined and settled as shown in the following statement and settlement certificate No. 23,729, submitted to the Secretary of the Treasury for payment. . . . Amount allowed \$181,-358.95" (Rec., p. 255); and that, "every condition precedent to the payment to said J. W. Parish, in accordance with said act of February 17, 1903, had been satisfied by the examination and settlement made on August 11, 1903, by the Auditor for the War Department;" that thereby the exact sum due said claimant had been fixed; that the duty imposed by the said act on the Secretary of the Treasury was not an official duty, in the sense in which those words are accustomed to be used, but the performance of a particular duty imposed by a special act, in order to secure justice to a private individual, that the examination and settlement of the account in question by the Auditor of the War

Department, as the proper hand of the Secretary for that purpose, was the rendition of the justice and the performance of the duty contemplated by the act, and left nothing for judgment to determine or for discretion to restrain or qualify, that "what was left to be done by the defendant was a purely ministerial act, in obedience to and in execution of the clearly expressed will of the law-making power, so that the said act of February 17, 1903, from and after the report or statement of account by said Auditor for the War Department, became and was mandatory upon the defendant," and that, "although every pre-requisite has been fully complied with for the payment of such balance due said Parish, for which the said act of February 17, 1903, expressly appropriates sufficient money, 'out of any money in the Treasury not otherwise appropriated,' the Secretary of the Treasury has refused to make payment of the said balance;" wherefore the appellant prayed a writ of mandamus to require the Secretary of the Treasury "to issue a draft in her favor for the sum of \$181,358.95, so found due as aforesaid, by the Auditor for the War Department." The sending of the statement by the Auditor to her testator, thus referred to in the answer, on its face showed that it was sent to him "care of attorney J. H. McGowan" (Rec., p. 25-8), making denial impossible by the appellee that, at the time she instituted her mandamus proceeding, she knew that the award upon which it was based, and on the findings upon which her entire mandamus proceeding was based had been secured while Mr. McGowan was her father's attorney, and had been transmitted to her father through him.

The Supreme Court of the District of Columbia, upon final hearing, denied the writ, which ruling was affirmed by the Court of Appeals (United States ex rel. Parish vs. Cortelyou, 30 App. D. C., 45.); but upon appeal to this Court (Parish vs. MacVeagh, 214 U. S., 124), the finding by the Auditor for the War Department was adjudged to have been final, as claimed, and that mandamus should issue, directing payment.

Summarizing from the foregoing the ultimate, essential facts of the case, the record without dispute shows the following:

1. That the passage of the act of February 17, 1903, was procured through the professional services of Messrs. McGowan and Brookshire.
2. That they followed up the passage of the act, with the assistance of Mr. Morey, procured by Mr. Brookshire, until their efforts resulted in the allowance to Mr. Parish of \$181,358.95.
3. That this result, thus procured through their professional aid, was followed by the transmission of a settlement certificate for that sum in Parish's favor, through Mr. McGowan as his attorney, leaving nothing remaining but the ministerial act of making payment.
4. That, following the refusal of the Secretary of the Treasury to perform this ministerial duty, Messrs. McGowan and Brookshire were ready, willing, and anxious to further prosecute the case by compelling payment, but were prevented from doing so by the conduct of Mr. Parish during his lifetime, and by that of the appellee, his executrix, after his death.
5. That the ground upon which the appellee with the

aid of the new counsel employed by her successfully prosecuted the proceedings for payment of the award was, that the claim had been prosecuted by Messrs. McGowan and Brookshire to a point at which the right to recover was conclusively established, and which left nothing remaining but the ministerial duty upon the part of the Secretary of the Treasury to pay the sum ascertained.

The Pleadings.

The bill, filed against Emily E. Parish, executrix of Joseph W. Parish, Franklin MacVeagh, Secretary of the Treasury, and Charles H. Treat, Treasurer of the United States, alleged the contract between Joseph W. Parish and Jonas H. McGowan of August 4, 1900, for payment by the former to the latter of a fee equal to 15 per cent of whatever might be awarded or collected on account of the claim, in consideration of the professional services rendered, and to be rendered, by McGowan; that McGowan had for a long time prior to the date of this contract rendered professional services as a lawyer to Parish in the preparation and prosecution of his claim, and continued, after the contract was entered into, diligently to render his professional services in its prosecution before Congress and its various committees. It further set up the contract between McGowan and Brookshire of December 3, 1902, and the contract between Parish and Brookshire of January 20, 1913, and avers that, pursuant to the employment mentioned and the agreements set forth, the complainants, in co-operation, diligently prosecuted the claim and rendered

valuable legal and professional services in preparing and making arguments before the proper committees in Congress, collecting evidence, filing and presenting petitions and briefs and making arguments; that the act of February 17, 1903, under which recovery was had, was drafted by McGowan and was advocated and urged in all proper ways before the several committees of the House and Senate by the complainants; that they further appeared, filed briefs, and made arguments before the Auditor, who allowed the claim for \$181,358.95 and gave notice of its allowance to Parish through McGowan as his attorney; set forth the subsequent proceedings before the Comptroller, the Solicitor and the Secretary, and the final disallowance of the claim by the latter; that after the Secretary's decision the complainants advised with Parish about the further steps necessary, and especially as to the institution of a mandamus proceeding to enforce payment; that, pending the prosecution of the claim, in order to relieve the pressing wants, and in view of the necessitous circumstances of Parish and his family, the complainants had advanced to him moneys amounting in the aggregate to about \$5,000, relying solely upon his promise to repay the sum so loaned out of what might be recovered from his claim; that his will named the appellant as his executrix, who, disregarding the rights and interests of the complainants and without consulting or advising with them, employed other attorneys, by whom she filed her petition for mandamus in the Supreme Court of the District of Columbia, which was disallowed by that court, and by the Court of Appeals of the District, but was finally allowed by the

Supreme Court of the United States; that the mandate of the latter court would shortly be sent down and the writ of mandamus would issue, requiring the Secretary of the Treasury to make payment to the appellee of the amount allowed by the Auditor; that it was the expressed intention and purpose of the appellant to ignore the lien and claim of the complainants, established by their contracts and by their services, and that she and her brother, Grant Parish, had declared that the complainants would never have a cent of the money; that, except for the ice claim fund, the estate of Parish was insolvent, claims aggregating \$25,000 having theretofore been filed and proved against it in the Supreme Court of the District of Columbia, and that, if the appellant and Grant Parish received into their hands the proceeds of the claim, they would immediately take them out of the jurisdiction for the purpose of defrauding and defeating the rightful lien and claim of the complainants. The bill further alleges that by reason of the premises and of the professional services rendered by the complainants, and each of them, and of their contracts, and of the award of the Auditor, McGowan and Brookshire each became the equitable owner of a tenth part or 10 per centum of the award, and were entitled to a lien upon it to that extent. Its prayers were, in effect, that McGowan and Brookshire might each be decreed to be the equitable owner of a one-tenth part of the award; that the appellant might be enjoined from applying for or receiving from the Treasury Department the said one-tenth part of the award claimed by McGowan and the like tenth part claimed by Brook-

shire; that the Secretary of the Treasury and the Treasurer, might be enjoined from issuing drafts to the appellant for such payment, that a receiver might be appointed to receive and hold the fund subject to the order of the court, and for general relief.

On June 2, 1909, the consent interlocutory decree, set out *supra*, pp. 2, 3, was entered, and the proceedings were had which have hereinbefore been stated.

The answer of the appellee called for strict proof of the McGowan and Brookshire contracts and of their professional services to her testator, waived a supposed objection of multifariousness to the bill, claimed that the agreements set up between the complainants and her testator were in violation of Section 3477 of the Revised Statutes of the United States as being attempted transfers or assignments of a claim against the United States prior to its allowance, the ascertainment of the amount due and the issue of a warrant for the payment thereof, but averred that she had joined in the consent decree in the cause under which a deposit had been made, larger than was necessary to satisfy the claims of both complainants, subject to determination by the court, in this cause, whether any amount and if so what, was justly due the complainants or either of them for their services in the matters described in their bill, which amount she averred would be the reasonable value of the legal services, if any, which they had rendered; and that, in pleading Section 3477, her object was not to secure the transfer to another forum of any valid contention which it was in the power of complainants to make under their alleged contracts, but simply to exhibit as her duty re-

required the limitations imposed by law thereon, in whatever forum the same might be adjudicated. Her answer, further, admits the allegations of the bill in respect to the passage of the act of February 17, 1903, and the various proceedings in the Treasury Department following its enactment, except that she neither admits nor denies the allegations in regard to the acts and services of the complainants in that regard. She denied the allegations of the bill to the effect that the complainants, after the decision of the Secretary of the Treasury, advised mandamus proceedings prior to the death of her testator, asserted that they never approached her after his death in respect to the steps necessary or proper to enforce payment, and averred by their actions that they had abandoned the prosecution of the claim; that she had no knowledge of the alleged advances to her testator, called for proof, pleaded the statute of limitations, and admitted that she employed other counsel to prosecute the claim.

Points and Authorities.

The assignments of error are set forth at pages 295-6 of the record. The questions, its decision of which forms the basis of the decree of the Court of Appeals according to its Opinion, at pp. 274-90 of the record, reported also in 39 App. D. C., 184, are reducible to the propositions following:

- I. Were the appellants entitled to relief in equity?
- II. Was it necessary, in view of the consent decree, to amend the bill?

III. Is relief precluded by Section 3477 of the Revised Statutes of the United States?

IV. Did the appellants abandon their contracts?

I, II.

The first and second of these questions are intermingled in the opinion of the Court of Appeals, and may perhaps be most conveniently considered together.

That the Court acquired jurisdiction of the person of the appellee is, of course, incapable of being contested.

1. Jurisdiction in Equity, Upon the Facts of the Case.

With respect to the subject-matter, after setting out the contracts, the services performed by the complainants, the award, that its procurement was the result exclusively of the services of the complainants and left only the ministerial duty on the part of the Secretary of the Treasury to pay its amount, the readiness of the complainants to render their services in the further prosecution of the claim, and the mandate of this Court directing the writ of mandamus to issue for its payment, the bill further averred (*a*) that, both by reason of the effect of the contracts and of the professional services rendered by the complainants, they became equitable owners of a part interest in the award, entitled to a lien upon it, and possessed of a right to receive a one-tenth portion, each, of the moneys paid in respect thereto; (*b*) that the estate of Joseph W. Parish was, except for the ice claim, insolvent; (*c*) that the complainants, to relieve the pressing wants of Parish and his

family, had advanced to him for his and their benefit various sums of money, upon his promise to repay the sums so loaned out of what might be recovered in respect to the claim; and (d) that, if the appellee or her brother Grant Parish should receive the proceeds of the draft, then about to be issued in payment of the award, there was danger that they would immediately take the same out of the jurisdiction of the Court, for the purpose of defrauding and defeating the complainants of their rightful lien upon the award. Based upon these allegations, equitable relief was prayed for, such as can be granted only by a court of equity.

No one of the allegations of fact thus set forth in the bill is the subject of any conflict or dispute in the testimony except that there is a denial by the appellee that she intended to take the proceeds of the draft then about to be issued in payment of the award out of the jurisdiction of the Court. That the complainants did make advances to supply the necessities of life to her testator and herself, that these were to be paid out of the proceeds of the ice claim, that the latter was the only possible source of payment, that the appellee evaded the service of process in this cause by denying her identity to the officer who sought to serve it at her home and on the street car, which officer she saw in the company of Mr. Morey and who, therefore, she must have known was seeking her in respect to this claim, and that, so far from offering or being willing to pay a single dollar to the complainants on account of the services which made possible this large recovery, she testifies in this case that she is not willing and does not propose to refund a dollar of

the moneys thus advanced by either Mr. McGowan or Mr. Brookshire for the support of her father and herself when otherwise destitute, and which advances she testifies were to be repaid out of the proceeds of the ice claim—because it is “not her debt”—appears from the statements of facts, *supra*, at pp. ~~20-21~~²⁰⁻²¹, of this brief; see also, Rec., pp. 127-8, 133, 151-2. That the defeat of the just claims of attorneys for compensation for their services in similar cases had heretofore been repeatedly resorted to successfully was a well-known fact in this jurisdiction, of which instances *Hovey vs. McDonald*, 109 U. S., 150; *McDonald vs. Hovey*, 110 U. S., 619, furnishes an illustration. That the facts above stated, proved out of the mouth of the appellee herself, constituted a real and reasonable ground to apprehend that danger in the present case existed is, we submit, sufficiently obvious for the purposes of equitable jurisdiction. They created a danger against which there was no adequate remedy at law, and one not to be defeated as a ground of jurisdiction, after the preventive powers of a court of equity have been sought and exercised, by a mere denial on the part of the appellee that she intended to remove the fund.

In the opinion of the Court of Appeals (Rec., p. 284), it is claimed that there was no jurisdiction in equity under the circumstances stated, because relief might have been obtained by application to the Probate Court to increase the bond of the appellee as executrix of Mr. Parish under Sections 263 and 296 of the Code of Law for the District of Columbia. In this contention, the learned Court inadvertently overlooked the considerations following:

- (1) It is the existence of an adequate remedy in the

courts of common law, not in tribunals of special, limited statutory existence and jurisdiction, which excludes jurisdiction in equity. The ground of the objection that an adequate remedy exists at law is to preserve to a defendant his constitutional right to a trial by jury, and no such right could be accorded him by the Probate Court.

(2) It is only where a court of law is "competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, that the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Hipp vs. Babin*, 19 How., 271; *Killian vs. Ebbinghaus*, 110 U. S., 573. The Probate Court of the District of Columbia, the jurisdiction of which Court is limited to the probate of wills, the administration of estates and the protection of infants and persons *non compos mentis*, was without competency to take cognizance of the rights of the complainants in this cause, and was wholly incapable of proceeding to a judgment to determine them. Had the course indicated by the Court below been pursued, it could, at most, have resulted in the giving of an increased bond by the appellee, and must then have been followed by a proceeding, in some other court, to determine the rights of the parties.

(3) The remedy suggested was not adequate. To seek it, the complainants must first have presented a petition to the Probate Court to increase the bond of the appellee as executrix, under which petition that Court must have issued a rule to the appellee to show cause, at a future

date, to be heard at the convenience of the Court in view of its other engagements; and, if the application were granted, the hearing must have been followed by an order giving the appellee a prescribed period of time within which to give the increased bond, which time was liable to be further extended in controversies over the sufficiency of the sureties proposed, and the like. It might have been entirely possible, before these proceedings could have reached the desired result, for the appellee to have collected the award and to have left the jurisdiction.

(4) The sections of the Code thus instanced by the Court below as affording the supposed adequate remedy are statutory, and were enacted long subsequently to the adoption of the Constitution of the United States, which distributed the judicial power between the common law and the equity courts. But for these statutes it is not even suggested by the opinion that any remedy at law, in any court, would have existed.

"Sometimes the Legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. Now (as we have seen), in neither case, if the courts of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of the authority at law in regard to legislative enactments; for, unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent, and not exclusive remedial authority."

1st Story Eq. Jur., Sec. 80.

See also, *Id.*, Sec. 64; *Mississippi Mills vs. Cohn*, 150 U. S., 202, 205.

This principle has been very clearly recognized by the Court of Appeals, itself, in *Gassenheimer vs. District of Columbia*, 6 App. D. C., 108, 116-17. See also, *Schroeder vs. Loeber*, 75 Md., 195, 204; *Kinsman vs. R. R. Co.*, 140 N. Y., 183; *American Association vs. Williams*, 166 Fed., 17, Lurton, J.

(5) The objection that there is an adequate remedy at law is one which must be taken at the earliest stage of the case. So far from raising such an objection by her answer, the appellee, as above stated, not only consented to the interlocutory decree (Rec., pp. 12-13) which provided for the placing in the hands of the court of \$41,000 subject to its determination "whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and in respect of the matters described in the bill of complaint," but, in her answer, reiterated that consent and expressly disclaimed any desire to transfer the controversy to any other forum.

In *Wylie vs. Coxe*, 15 How., 415, 420, this court said:

"The want of jurisdiction, if relied on by the defendant, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill."

In *Kilbourn vs. Sunderland*, 130 U. S., 505, 514, this Court said:

"We have had occasion recently to remark that, where it is competent for the court to grant the

relief sought, and it has jurisdiction of the subject-matter, this objection should be taken at the earliest opportunity and before the defendants enter upon a full defense. *Reynes vs. Dumont, ante*, 354. By stipulation several suits had in effect been consolidated with the intention, by consent, of adjusting the conflicting claims between Sunderland and Hillyer jointly, and Sunderland alone, and Kilbourn, Latta, and Olmstead and Latta alone, and the parties had proceeded in their pleadings upon that theory, and taken all the evidence, and had the cause set down for hearing. It is then suggested that Sunderland and Hillyer and Sunderland can not maintain their suit in equity, but must be remitted to actions at law. We do not agree with this view."

Kilbourn *vs.* Sunderland, 130 U. S., 505, 514.
 And see Brown *vs.* Iron Co., 134 U. S. 530,
 536; Perego *vs.* Dodge, 163 U. S., 160, 164;
 Burbank *vs.* Bigelow, 154 U. S., 558, 559;
 Lutcher & Moore Lumber Co. *vs.* Knight,
 217 U. S., 257, 266-7.

The Court of Appeals of the District of Columbia has repeatedly recognized the same principle.

Tyler *vs.* Moses, 13 App. D. C., 428, 442-3.
 McGowan *vs.* Elroy, 28 App. D. C., 188, 196.
 U. S. Trust Co. *vs.* Blundon (December 7, 1914),
 42 Wash. Law Rep., 788.

"The objection that the matter of plaintiff's demand is one of equitable cognizance in the Federal courts can not prevail. No such objection was raised in the Court below at any stage of the proceedings, and *it can not be permitted*

[italics ours] to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court."

Burbank *vs.* Bigelow, 154 U. S., 559, quoted and followed in Lutchter & Moore Lumber Co. *vs.* Knight, 217 U. S., at p. 267.

Objection to the jurisdiction in equity to entertain a creditor's bill on the ground that the complainants had not obtained judgment or otherwise pursued their remedy at law, ordinarily fatal, comes too late after a consent decree appointing receivers and an admission of the facts alleged in the bill.

In re Metropolitan Railway Receivership, 208 U. S., 90, 109-10.

Consent to a reference to an arbitrator and that his award shall be made the basis of a decree is a waiver of the objection that the remedy was at law and not in equity.

Strong *vs.* Willey, 104 U. S., 512.

The foregoing, we submit, is conclusive that the decree of the Supreme Court of the District of Columbia should not have been reversed on the ground that the complainants had a remedy at law.

2. The Attorney's Lien.

A further ground of equity jurisdiction, unnecessary, unless the foregoing propositions are untenable, is the equitable lien of the attorneys upon the fund produced by their exertions, the existence of which lien was

denied by the Court of Appeals (Rec., p. 283). The view of the learned Court, upon this question in the case is that under the doctrine of *In re Wilson*, 12 Fed. 235, 237; *Massachusetts & Southern Construction Co. vs. Township of Gills Creek*, 48 Fed., 139, 147; *Foster vs. Danforth*, 59 Fed., 750, 751, and *Adams vs. Kehlor Mining Co.*, 38 Fed., 281, 282, the attorney's lien does not attach unless the fund is realized by his services, and that, even though he reduces his client's claim to judgment, he has no lien if the payment of the judgment is enforced by means of another suit, in a different court, the latter of which propositions is supposed to be supported by the case last above cited.

Of the cases thus cited by the Court, *In re Wilson*, 12 Fed., 235, 237, and *Massachusetts & Southern Construction Co. vs. Township of Gills Creek*, 48 Fed., 145, hold, only, that, while the judgment lien of the attorney secures his compensation in the case in which the judgment was rendered, it does not secure the general balance of his client's indebtedness to him for services rendered in other causes; while *Foster vs. Danforth*, 59 Fed., 750-51, holds only that the lien exists solely in favor of the attorney in the cause, and does not extend to other attorneys employed to advise and assist him. That these citations are without relevancy to the case at bar would seem to be obvious.

In *Adams vs. Kehlor Company*, 38 Fed., 281-2, the remaining case cited, the question was whether the lien of an attorney who had recovered a judgment in the State court for his client could be enforced by a Federal court, in a suit in the latter court by a judgment creditor against third persons, not parties to the action in which

the judgment had been recovered, to set aside a conveyance to the latter by the judgment debtor, executed it was claimed to delay, hinder and defraud his creditors. The entire question is disposed of by a single sentence in the opinion of the Federal court, as follows, the italics being ours:

"It is clear that this court has no authority to tax *against the defendants* any fees due *from the complainants* to their solicitors for services rendered in a suit in the State court, although the judgment obtained in that suit forms the basis of the proceeding in the Federal court."

Inasmuch as the defendants, in the Federal court, were not defendants or connected in any way with the action in the State court, and since the application, as shown by the opinion (p. 282), was one made by the complainants' solicitors "for an allowance of fees, *to be taxed as costs against the defendants*," the application of this citation, also, to the case at bar, is not apparent.

If, in this case of *Adams vs. Kehlor*, the proceeds of the judgment were, as in the case at bar, before the court for distribution, and if the attorney's claim for compensation was a lien upon that judgment, it is difficult to see upon what principle the judgment creditor could have taken the proceeds of the judgment, divested of the lien of his attorney who had recovered it. The application to the court presented no question at all concerning the right of the attorney to a lien upon a judgment recovered by him, or upon its proceeds, but as to his right to require the fraudulent grantee of the judgment debtor

to pay the compensation of the judgment creditor's attorney in recovering the judgment, in another action, and in another court. The effect of the application, if successful, would have been to defeat any necessity for the lien, or to extinguish it if it existed, by securing payment of the attorney's compensation in another way.

A case which does decide the question thus mooted by the Court of Appeals, namely, whether an attorney who recovers a judgment for his client is entitled to a lien upon it for his compensation, where the services of other attorneys are employed to realize upon it, is *Jenkins vs. Stevens*, 60 Ga., 216. In that case, the plaintiff's attorney had reduced the claim to judgment, which judgment had remained dormant through inaction until it had ceased to be a lien upon the debtor's property. The original attorney dying, the judgment was revived and the money collected by other attorneys; and the question presented was whether the personal representative of the original attorney, under these circumstances, was entitled to a lien upon its proceeds for his compensation. The Court said:

"The first judgment was yet of record, and the attorney's lien for services rendered in obtaining that judgment attached thereto, and was not defeated because it lost its lien on the defendant's property by becoming dormant under the statute. It was still a judgment debt, obtained by the services of the attorney,"

and the lien was accordingly sustained.

As will presently be shown, the lien of the attorney attaches not only to judgments, but to property interests

otherwise established through the attorney's services for the benefit of the client. If this principle be established, it will be observed that the case last cited, *Jenkins vs. Stevens*, is in every particular identical with the case at bar, except that, in the latter, the appellee has placed in the hands of the Court a sum sufficient to satisfy the claim of the attorneys and by her consent has charged the Court with the duty of applying the fund to that purpose if in its judgment the attorneys are justly entitled to recover compensation for their services. In the case at bar, the award of the Auditor, obtained by the services of the appellants, was, as established by the decision of this Court in *Parish vs. MacVeagh*, 214 U. S., 124, not only in effect a judgment against the United States, conclusive of the right of Parish to recover its amount, but one the necessary appropriation to pay which had been, also, secured by the appellants, their equitable right upon which, or, which is the same thing, their right to be paid out of its proceeds for their services, could not be defeated by the fact that the judgment creditor employed other counsel to enforce its payment. It was only upon the ground that the award secured by the appellants constituted a final adjudication of the right of Parish to recover—in other words, that it was in every essential particular a final judgment, that the new attorneys employed were able to succeed in its enforcement.

Another authority, conclusive of the question now under consideration, is *Cowdrey vs. R. R. Co.*, 93 U. S., 352, in which an attorney had been employed by the trustees of a mortgaged property to foreclose the mortgages, had prosecuted the suit until it was interrupted

by the Civil War, and, after its termination, had offered to proceed with it; but a new suit was instituted and prosecuted to foreclosure by other attorneys on behalf of the bondholders secured by the mortgage without his assistance. This Court held that the representatives of the original attorney were nevertheless entitled to be paid, out of the proceeds of the mortgaged property, realized in the new suit, for the service rendered by him in the old.

That the lien is not confined to judgments, but attaches to any fund, or property the client's right to which has been established by the attorney's services, is clear, under all the authorities. The English practice, which confined this lien to the taxed costs, was due to the division of professional labor there between attorneys and barristers, the latter of whom in theory earned no legally enforceable compensation, the attorneys, alone, being authorized to enforce at law their taxable charges; the failure to note which distinction was the foundation of decisions in some of the States of this country which limited the lien to taxable costs. *Ware vs. Campbell*, 38 Ala., 527, 531-2. Under the rule prevailing in this country that the attorney is legally entitled to compensation for the services which he renders, the lien here very generally extends to the entire compensation to which he is entitled.

In *Claflin vs. Bennett*, 51 Fed., 693, differing from the cases cited by the Court of Appeals and above referred to, it is held that, where a fund is in a court of equity for distribution, the plaintiff's attorneys are entitled to receive from it the moneys due them from the plaintiff for

meritorious services rendered by them to him in other suits, growing out of the purchase of the property from which this fund was realized, at least where the services were rendered with the expectation of being paid for from the proceeds of the judgment.

Coming, now, to the question whether a judgment is essential to the lien, *Brown vs. Bigley*, 3 Tenn. Ch., 618, 626, holds that it "dates from the commencement of the suit in which the services were rendered;" this case further holding that, although the action be at law, the lien is an equitable one, and may be enforced by an original bill in equity. Upon the latter point, see also, *Riddle vs. Hudgins*, 58 Fed., 490, 492; *Evans vs. Silvey*, 144 Ala., 401.

In *Cowdrey vs. R. R. Co.*, 93 U. S., 352, *supra*, it has already been pointed out that an attorney in a foreclosure suit, not prosecuted to a decree, was, nevertheless, held entitled to be paid out of the proceeds of a foreclosure under the same mortgage in a different suit, conducted by other attorneys—which right, to be so paid, is in all respects identical with what is designated as the attorney's equitable lien.

In *Koons, Administrator, vs. Beach*, 147 Ind., 137, the question was whether an attorney had a lien against a fund realized by compromise, without suit, upon a contested insurance policy, under a statute giving a lien, only, upon judgments. Holding that there was no lien under the statute, the court said:

"The lien which an attorney is said to have is merely a claim to the equitable interference of the court for his debt when he finds that his client

is about to deprive him of it. See Jones on Liens, Section 155, and the numerous illustrations there given. When, therefore, equity is appealed to, the inquiry is not, necessarily, did the attorney procure a judgment? But it is, does he present a claim where the law supplies no remedy as efficient, and where, in good conscience, the client should not be permitted to defeat the attorney of his just compensation? One test of this claim, as originally shown, is this: Was the fund secured by the client through the efforts of the attorney? And another is: Was the compensation of the attorney expressly or by implication such a charge against the fund as to amount to an assignment of some part thereof? In either event equity will aid the attorney in the enforcement of his claim, ordinarily called a lien."

The court thereupon cites *Davies vs. Lowndes*, 54 E. C. L., 808, in which the lien was held to attach to money received by the client by way of compromising his suit, even after a verdict and judgment against him, commenting upon which the court said: "Therefore it could not be said that a judgment in favor of the client is indispensable." The opinion also cites *Irving vs. Viana*, 2 Young & Jerv., 70, in which the attorney was held to have a lien on a fund which his exertions had aided in producing; and, in further upholding the lien, the court refers to *Wylie vs. Coxe*, 15 How., 415, as follows:

"It was held that equity would enforce a lien in favor of an attorney who had partially prosecuted a claim against the Mexican Republic, before a commission created by an act of Congress, but before it was concluded his client had died,

and an administrator had discharged the attorney and employed another, who recovered the money, and it had been paid into the hands of the administrator. There, as here, there was an agreement upon a designated sum to be paid from the amount recovered. The commission was not a court of record; the attorney had not prosecuted the claim to judgment; the relief sought was not in the tribunal in which the money was recovered; the lien enforced was not upon the judgment, but, as here, against the funds in the hands of the administrator."

In *Fischer-Hansen vs. R. R. Co.*, 172 N. 1., 492, as in *Wylie vs. Coxe*, it was held that, "upon common law principles, the lien on a cause of action follows the proceeds into the hands of the client, after payment to him," demonstrating that it is much more than a mere lien upon the judgment, which judgment is extinguished by the payment.

In *Justice vs. Justice*, 115 Ind., 201, the charges of an attorney who had successfully contested a will were held to be a lien upon the land thereby secured to his client as one of the heirs of the testatrix, which lien it was held had priority over the claim of a subsequent judgment creditor of the client, quoting from *Paett vs. Beard*, 86 Ind., 172, as follows:

"It is generally agreed, both here and in England, that a solicitor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund, or those claiming as their creditors. *Barker vs. St. Quentin*, 12 Mees. & W., 441; *Vaughan vs.*

Davies, 2 H. Bl., 440; *Wylie vs. Coxe*, 15 How., 414; *Stratton vs. Hussey*, 62 Maine, 286; *Andrews vs. Morse*, 12 Conn., 444. The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected.' See, also, *Adams vs. Lee*, 82 Ind., 537."

It was only upon the ground that the services of the appellants had created the fund in question, leaving nothing further to be done but the ministerial act of paying the money, that the fund, in the case at bar, was realized by the appellee. What stronger case could possibly be presented for the application of the principle stated?

In *Justice vs. Justice* the opinion cites, also, *Spencer's Appeal*, 9 Atl. Rep., 523, and *Boyle vs. Boyle*, 106 N. Y., 664, in which the equitable lien of the attorney was held to attach to funds which his services had created, in neither of which cases was a money judgment recovered for the client.

Finally upon the question whether a judgment is essential to the existence and enforcement of a lien for an attorney's compensation, the case of *Ingersoll vs. Coram*, 211 U. S., 335, we submit is conclusive. The attorney in that case, employed to contest a will, succeeded in bringing about a compromise under which his clients realized a greater share of the estate than they would have received if the will had been defeated and the testator held to have died intestate; and the suit was by the administrator of the attorney, to enforce a lien in his favor

against the share of the estate thus secured for his clients. This court said:

"The Circuit Court found, and, we think, rightly found, that the agreement sued on was performed. In other words, that the will of Davis was defeated, and that the contestants got their shares through the services of Ingersoll. The form in which the defeat was expressed is unimportant. The will as propounded was defeated. As propounded, it cut them off from inheritance. As qualified in probate, by compromise, more property was received than would have come to them by inheritance."

Upon the general subject of the attorney's lien, an attorney whose professional services have produced a sum of money or other property asset has an equitable lien upon or part ownership in it from the date of rendition.

Jones on Liens, secs. 155, 153.

Wilkins *vs.* Carmichael, 1 Dougl. Rep., 104, 105.

Brown *vs.* Morgan, 163 U. S., 398-9.

Waring *vs.* Campbell, 38 Ala., 531-33.

Central R. R. Co. *vs.* Pettus, 113 U. S., 127.

Fischer-Hansen *vs.* R. R. Co., 173 N. Y., 495-6, 500.

Brown *vs.* Bigley, 3 Tenn. Ch., 626-7.

Renick *vs.* Ludington, 16 W. Va., 391.

Weed *vs.* Boutelle, 56 Vt., 578, 579-81.

Shapely *vs.* Bellows, 4 N. H., 355.

The fact, recognized and established by the above authorities, that this is not a common law but an equitable lien, of itself would establish the jurisdiction of a court of equity to maintain a bill for its preservation and

enforcement. See *Tinsley vs. Durfey*, 9 Ill., 243. According to many authorities it is enforceable exclusively in equity.

Riddle vs. Hugdin, 58 Fed., 492.

Brown vs. Wisconsin Co., 26 Wisc., 212.

Lawson vs. Worcester, 58 Vt., 387.

Evans vs. Silvey, 144 Ala., 401-2.

The attorney is an equitable assignee of the judgment.

Renick vs. Ludington, 16 W. Va., 391.

Mosley vs. Norman, 74 Ala., 424.

McWilliams vs. Jenkins, 72 Ala., 487.

Miedreich vs. Bank, 40 Ind. App., 398.

Newbert vs. Cunningham, 50 Me., 232-4.

McDonald vs. Napier, 14 Ga., 111.

"The evidence proves the complainant was to receive a contingent fee of 5 per cent out of the fund, whether money or script. This being the contract, it constituted a lien upon the fund, whether it should be money or script."

Wylie vs. Coxe, 15 How., 416.

The ruling in *Trist vs. Childs*, 21 Wall., 441, that an agreement to pay a sum out of a fund recovered does not constitute a lien, overlooked, as was said by this court in *Barnes vs. Alexander*, 232 U. S., 117, 120, the contrary rulings in *Wylie vs. Coxe*, was not necessary to the decision, and is not to be regarded as binding upon the question, the decision in *Barnes vs. Alexander* following *Wylie vs. Coxe*; *Ingersoll vs. Coram*, 211 U. S., 335, 365-68, and other English and American authorities to the contrary.

The foregoing discussion, it will be observed, is quite independent of the question of a lien by contract, which contract lien it was held below fell under the inhibition of Section 3477 of the Revised Statutes. That defect or vice in the contracts, if it existed, was separable, and did not vitiate the contracts in other respects. *Nutt vs. Knutt*, 200 U. S., 12. Eliminating it, upon that authority, we have simply a case in which attorneys were employed by the client to prosecute his claim for a contingent fee, did so to the point of judgment, and claim an equitable lien or right to be paid their contract fee out of its proceeds. That such contracts, i. e., for a contingent fee, are valid, and that, creating a *pro tanto* assignment in favor of the attorney by operation of law, they do not fall under the prohibition of Section 3477, will be considered under proposition III of this brief.

But accepting the conclusions of the Court of Appeals and assuming for the moment that it was right in holding that Section 3477 was applicable to this case, and the contracts, in so far as they created liens and equitable assignments, were within the purview of the statute, how does that conclusion affect the *jurisdiction* of the Court—the power of the Court sitting in equity to hear and determine the cause and to do justice in the matter of the complaint?

The Court of Appeals held that, as there were no equitable assignments, no liens, the case made by the bill of complaint became a mere money demand, for which the complainants had their adequate remedies at law, and that a court of equity was powerless to do justice. It even held that the court "might, in the exercise of its

discretion and of its own motion have dismissed the bill for want of jurisdiction" (Rec., p. 284).

Conceding, as we do, but only for the purposes of the argument, that Section 3477 may be applicable to the present case, yet the conclusion reached by the Court of Appeals is incorrect because jurisdiction to hear and determine the cause may have existed and in this case, did exist, although, under the statutes the contracts were voidable. *The error consists in a misconception of the scope and effect of Section 3477. It does not make contracts and assignments that come within its description void, but only voidable.* Consequently, when a suit is filed either in law or equity, which is based upon a contract, or an assignment which may come within the prohibition of the statute, the Court can not, as a matter of necessary judicial duty, or even in its discretion, if the cause of action or right to relief is otherwise perfect, give judgment against a plaintiff, or dismiss a bill in equity, without waiting to hear whether the parties defendant will avail themselves of the defense of the statute. These parties may be officers of the United States sued or sought to be enjoined, or the other parties to the contract in question, the debtors or assignors. It may be that when such a situation is presented, as in the present case, it is open to the United States, or its officers and agents, when they are made parties defendant, to set up the statute as a defense. As to the other parties, as we expect to contend later, they may *not* avail themselves of the prohibition of the statute as a defense. The point we now make is that the defense must be made before the Court can act upon it, and any cause is *justiciable* even though it be based upon a

contract or assignment which is apparently prohibited by the statute, provided, of course, the case contains all the elements of a good cause of action at law, or a right to relief in equity. Hence in no case can the jurisdiction of the court—the power to hear and determine the cause and to do justice—depend upon the voidable character of the contract or assignment sued upon.

The situation is in no respect like that presented when a cause of action is based upon a contract absolutely void, as on a contract opposed to public policy, a gambling, or lobbying contract. There, of course, the question of jurisdiction does not arise in an action at law, for a court would have power to dispose of the case by giving judgment against a defendant. In equity, in a sense only can it be said that the invalidity of the contracts affects the question of jurisdiction. If the right to relief is built upon such a contract, if it be that the contract is relied upon as creating the right to relief which, without it, a court of equity could not afford, as where an equitable assignment is sought to be established, the jurisdiction of the court of equity would not exist if the contract is actually and absolutely void, a nullity.

When, however, the contract is not *void* but *voidable*, as when it is a contract within the Statute of Frauds and not in writing, or the contract of an infant, a court of equity has power to consider the equities presented, based upon the contract, and to hear and determine the cause, even though the invalidity of the statute be relied upon as a defense. The result might be a denial of the relief prayed. It could not be the dismissal of the bill for want of jurisdiction.

In respect of the effect of Section 3477, the Court of Claims has likened it to the Statute of Frauds.

In Buffalo Bayou R. case, 16 Ct. Cl., 238, that Court said:

"The statute, as construed by the Supreme Court in *Spofford vs. Kirk* (97 U. S. R., 484), undoubtedly operated upon this instrument so as to render it wholly void. Nevertheless, while courts of the United States can not give effect to such powers or assignments so long as they remain unexecuted, they can not ignore consummated transactions under them by either permitting the assignor to recover from the assignee the money paid him or by compelling the Government, whose officers have acted on the faith of such an instrument, to pay the debt a second time. The purpose of the statute was not to protect individuals, nor to regulate the business transactions of private persons, but to protect the Government. The purpose is well expressed in the title of the act 1853—'An act to prevent frauds upon the Treasury.'

"Our meaning will perhaps be made clearer by a familiar illustration. A statute of frauds will declare certain agreements to be absolutely void, and no court of the country will be at liberty to enforce them. Nevertheless, if two persons voluntarily enter into such a contract and voluntarily carry it into effect, the one party can not sue for and recover back the money which he may have paid and the other can not sue for and recover a higher price for the goods which he may have sold, and no court will be at liberty to undo what the parties have themselves voluntarily done. This statute to prevent frauds upon the Treasury

is of the nature of a statute of frauds. It was designed to absolve the Treasury from all complicity in or responsibility for the sale or assignment of claims until they had reached the point where in the form of drafts they would be merged in negotiable evidence of debt, and where, the amount being ascertained and fixed, the assignments or power of attorney could describe the chose assigned with the most accurate exactitude and certainty. At the same time, the statute did not forbid the officers of the Treasury from recognizing or acting upon the instruments declared void, nor did it declare the sale and assignment of claims to be champertous or penal. In a word, it left these assignments and powers of attorney precisely where the statute of frauds left the agreements which it declares void—as instruments which can not be enforced at law, but which, when voluntarily given by the Government creditors, and voluntarily carried into effect by the defendants' officers, must be deemed by all courts to have expressed and executed the true intent of the parties."

This court has so often considered this statute and has so often explained that its effect is to render assignments *voidable* and not *void* that it is necessary only to refer to the cases without enlarged statement.

Bailey *vs.* U. S., 109 U. S., 432.

Irwin *vs.* U. S., 97 U. S., 392.

Goodman *vs.* Niblack, 102 U. S., 556.

McKnight *vs.* U. S., 98 U. S., 279.

Freedman's Savings and Trust Co. *vs.* Shepherd,
127 U. S., 494.

Hobbs *vs.* McLean, 117 U. S., 567.

Butler *vs.* Goreley, 102 U. S., 556.

Price *vs.* Forrest, 173 U. S., 410.

We submit, therefore, that as the contracts and assignments set up in the bill as the basis of the jurisdiction of the equity court were not void, but merely voidable at the option either of the officers of the Government, or of the parties to the contract who were made parties defendant to the suit, the case presented by the bill was one for equitable cognizance. Jurisdiction, the power to hear and determine the cause, attached, whether the parties defendant would subsequently exercise their option of setting up the defense of the statute or not. If they did, then they might defeat the right of the complainants to the relief sought by the bill; but they could not deprive the court of its jurisdiction to hear and determine the cause.

3. The Effect of the Interlocutory Decree, and of the Consent.

If, under any of the foregoing contentions, the bill was properly maintainable in equity, the error of the Court of Appeals in its ruling to the contrary is sufficiently established. There is, however, a still further ground upon which, we submit, the Supreme Court of the District of Columbia was right in sustaining the jurisdiction, namely, the effect of the consent interlocutory decree and of the answer.

Under the decisions both of this Court and of the Court of Appeals, as well as universally elsewhere, the objection to the jurisdiction based upon the adequacy of the remedy at law, which is the only objection to the jurisdiction asserted or capable of being asserted in this case, is held to be waived by the defendant if he fails to present it by a demurrer, plea or answer at the early stages of the pleadings. If he may thus, by mere implication, so

waive the objection as to render it unavailable later, what is to be said of the effect of his affirmative admission and consent that the case is a proper one for adjudication in equity, and of an interlocutory decree by the court, consented to by him, to that effect? This is precisely the case which we have here.

Immediately upon the filing of the bill of complaint, on May 22, 1909, a restraining order was issued and served upon all the defendants, Emily Parish, executrix of Joseph W. Parish, deceased; Franklin MacVeagh, Secretary of the Treasury, and Charles H. Treat, Treasurer of the United States, restraining the first named from applying for, demanding or receiving any order, draft, or warrant for the payment of the award mentioned in the bill of complaint, and MacVeagh and Treat from issuing to Emily Parish such order, draft, or warrant.

All the defendants were at the same time served with a subpoena to appear and answer the exigency of the bill.

Secretary MacVeagh and Mr. Treat, Treasurer of the United States, never appeared and never answered. Instead, the bill was dismissed as to them by the consent decree of June 2, 1909.

This consent decree now requires analysis.

Before answer filed or even appearance entered, the defendant, Emily Parish, by her counsel, and the complainants, by their counsel, brought the cause on for hearing.

The very first recital of the decree is:

"This cause coming on to be heard this second day of June, 1909, by the consent of the complainants and the solicitors of Emily E. Parish, it is *adjudged and decreed*——"

The decree must therefore be treated not only as a consent and waiver, but also as an adjudication.

It then goes on to dissolve the restraining orders issued against the three defendants and *dismisses the bill* as to Secretary MacVeagh and Mr. Treat.

As to the defendant, Emily Parish—

“it is further adjudged, ordered and decreed, that said restraining order be and the same is hereby dissolved . . . provided, however, and it is *adjudged* that in respect of the sum of forty-one thousand dollars,” part of the award of \$181,385.95, directed by the Supreme Court to be paid to Emily Parish, executrix, by the Secretary of the Treasury, said Emily Parish is “enjoined and prohibited from receiving any warrant or draft for said sum of forty-one thousand dollars (\$41,000), or any part thereof, from the Treasury Department or any official thereof, and from receiving said sum or any part of it.”

Emily Parish was further directed by the decree—

“to make and execute a proper power of attorney authorizing and empowering Corcoran Thom, Vice-President of the American Security and Trust Company to receive any warrant, draft or check that may be issued in respect of said sum of forty-one thousand dollars (\$41,000) “and to endorse the same for her, to collect the proceeds and to deposit them when received with the American Security and Trust Company “*to the credit of this cause, and subject to the further order of this court herein and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complain-*

ants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint."
(Rec., pp. 12-13.)

The defendant Emily Parish obeyed this decree by executing a power of attorney to Corcoran Thom. The proper officials of the Government honored the power of attorney and delivered a draft for \$41,000 to Corcoran Thom, who in turn, deposited it with the American Security and Trust Company to the credit of this cause, and there it is now, awaiting a final decree.

Here, then, clearly we have a *waiver* of the possible defense of the statute by all the parties defendant, the officials of the Government as well as the parties to the contract, and also, accompanying that waiver, an *adjudication* by the court, upon the equities made in the bill, based upon the contracts and equitable assignments and liens, that the matter should be determined by the court in which the suit was filed, a court of equity.

By this waiver the parties were estopped thereafter to deny jurisdiction, and by the adjudication, from which, having been entered by consent, no appeal was or could have been taken, it was finally determined that the complainants had liens upon the fund which they had created and were equitable assignees thereof to the extent of their pro rata shares as provided by their contracts, *provided* it should be determined by the court that they had in fact entered into the contracts in question, and had performed the services required of them, and had by those services created the fund in question.

The question now under consideration is whether,

notwithstanding the interlocutory decree thus consented to by the parties and passed by the Court, and the answer of the appellee under which the complainants and the Court were invited by her to proceed, and did proceed, to the determination of the question thus specifically and expressly submitted to the Court for decision, the appellee can be permitted, when the decision has been determined against her, to object that there was an adequate remedy at law and that the Court was, therefore, without jurisdiction.

In *Frank vs. Bruck*, 2 Ill. App., 627, a consent foreclosure decree had provided for sale absolutely, without redemption, from which decree one of the consenting parties later appealed. The court held the decree to be a manifest departure from the provisions of the Illinois statute, which gave a power of redemption in all cases of sales under foreclosure decrees, but that there could be "no doubt that parties laboring under no disability can, by their express consent, authorize the rendition of a decree barring themselves of any rights which may be the subject of litigation. It is an elementary principle that a decree by consent can not be appealed from, nor can error be properly assigned upon it. 1 Barb. Ch., 373, *Armstrong et al. vs. Cooper*, 11 Ill., 540." Upon the same principle, any particular provision or portion of a decree entered by the consent or agreement of a party, can not be by such party assigned for error.

Manyou vs. Fahy, 11 W. Va., 482, 496-500, points out that, under the authorities, both English and American, while a consent decree may, during the term at which it is entered, be modified or annulled, it may not be so

set aside subsequently, nor can it be appealed from or be the subject of a writ of review, but must be attacked, if at all, by an original bill, and then only on the ground of fraud or mistake. No attempt in the case at bar was made to modify or alter the terms of the interlocutory decree in the lower court; it remained in full force until the final decree in that court, nor has any proceeding been resorted to for a change, in any respect, of any of its terms, down to the present time. The Court of Appeals neither attempted to modify or interfere with it, and clearly was without jurisdiction to do so. It neither has been, nor can be, claimed that, in its final decree, the Supreme Court of the District of Columbia departed from the express provision of the decree of June 2, 1909, that the court should determine, in that cause, whether any amount, and, if so, what amount was due the appellants, or either of them, for the professional services which they, or either of them, had rendered in the prosecution of the Ice Claim.

In re Petition of New York, Lackawanna & Western Rd. Co., 98 N. Y., 447, a stipulation had been entered into between a railroad corporation and an owner for the purchase of certain lands of the latter, the agreement providing that the price should be ascertained in a judicial proceeding to be instituted, under the general railroad act of New York; that certain commissioners, named in it, should be appointed for that purpose, and that they should determine the price upon certain stipulated principles, including authority to use their own knowledge and information for their guidance as well as the evidence which should be adduced. The

General Term reversed the order of the lower court confirming the award, but refused to grant new commissioners to value the property, on the ground of lack of power to do so in view of the fact that the commissioners for that purpose had been named in the agreement between the parties. The Court of Appeals sustained this action, on the ground that whatever in the agreement bound the parties, bound the court; that the agreement between the parties was a factor which the court was bound to recognize and to give proper weight and significance, and that the court could not, in violation of the agreement between them, appoint new commissioners.

In *Nashville Railway Co. vs. United States*, 113 U. S., 261, 266, in which a subsequent suit was attempted to be maintained notwithstanding a prior decree by consent of the parties, this court said:

"But the insurmountable difficulty is that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal. Courts of chancery generally hold that from a decree by consent no appeal lies. 2 Dan. Ch. Pract. Ch., 32, sec. 1; *French vs. Shotwell*, 5 Johns. Ch., 555; *Winchester vs. Winchester*, 121 Mass., 127. Although that rule has not prevailed in this court under the terms of the act of Congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause."

It must follow, we submit, that the appellee by the consent to the interlocutory decree, and by her answer,

invited the court below to determine, in this cause, the question of the right of the appellants to be compensated, and to what extent, out of the proceeds of the award, and was without standing in the Court of Appeals to appeal, or to be accorded the benefit of an appeal, from the result of that decree.

So in *Town of Bristol vs. Brown & Warren Water Works*, 19 R. I., 631, the court said:

"The decree which the respondents by their motion seek to have revoked, having been entered by consent, can not be set aside or revoked except by consent. 2 Dan. Ch. Pl. & Pr., 6 Am. Ed., 973, 1459, and notes; 5 Ency. Pl. & Pr., 960."

See, also, *Lutcher & Moore Lumber Co. vs. Knight*, 217 U. S., 266, citing *Burbank vs. Bigelow*, 154 U. S., 559.

The unanswerable effect of the interlocutory decree and of the answer seems to have been duly appreciated by the Court of Appeals, and to be conceded (Rec., p. 285), by the following language (Rec., p. 285) in its opinion:

"Certain recitals of the decree, supplemented by the answer, would seem, however, to amount to a waiver of the question of jurisdiction to the extent that complainants might claim the reasonable value of their services, and such waiver would, under the circumstances, justify an appellate court in exercising its discretion in retaining the cause for hearing on its merits. *Rynes vs. Dumont* 130 U. S., 354-395; *Kilbourne vs. Sunderland*, 130 U. S., 505-514; *Brown vs. Lake Superior Iron*

Co., 134 U. S., 530-536; *Hollins vs. Brairfield Coal & Iron Co.*, 150 U. S., 371-381; *In re Met. Receivership*, 208 U. S., 90-110; *Tyler vs. Moses*, 13 App. D. C., 428-443."

This effect of the consent decree and the answer, however, is sought to be nullified (Rec., p. 286), upon the contention that an amendment of the bill was necessary to entitle the complainants to proceed upon the waiver to the jurisdiction thus established, and that, no such amendment was made, the parties and the court below having proceeded throughout the taking of testimony and at the final hearing, without objection, on the theory of the right of the complainants, to have the Court determine in the suit as it stood, without amendment, the question whether any amount, and if so how much was before the court for determination in the cause.

This brings us to proposition II, *supra*, whether amendment was necessary.

The bill set out all the facts of the case, as fully as could have been done by any amendment. It is not suggested, even, by the Court of Appeals that any new facts were necessary to be alleged by way of amendment, but only that there should have been a prayer for a recovery on a *quantum meruit*. The prayers of the bill, as they stood, included a prayer for general relief, which prayer, under the circumstances, was sufficient, even if it be conceded that the plaintiffs were not entitled to the relief specifically sought. Where all the facts are stated in the bill, there is no reason to deny relief under a general prayer, even though it may differ from

the theory of the law upon which the special prayers for relief are based, where both prayers are based upon the same facts.

Finley vs. Lynn, 6 Cranch, 238.

Walden vs. Bodley, 14 Pet., 156.

Lockhart vs. Leeds, 195 U. S., 427.

"It is supposed to be unreasonable to compel a specific performance under the general prayer for relief, in opposition to the specific prayer that the contract may be set aside. To this objection it may well be answered that, if it be improper to rescind or to modify the contract, nothing remains to be done under the general prayer but to dismiss the bill, or to decree an execution of the contract. But, as the former can not be presumed to be the object of the general prayer, it would seem to follow that an execution of the contract was intended to be asked for in case the specific relief should be denied."

Hepburn vs. Dunlop, 1 Wheat., 179.

It would have been a vain thing to amend the bill by the addition of a prayer for the ascertainment of "whether any amount, and, if so, what amount is justly due the complainants, or either of them," when not only had all the parties, by the interlocutory consent decree, consented to the doing of that very thing, in the very cause, but had deposited a fund in court for distribution which the court could not distribute without determining that question, except by violating the terms of its own decree, under which the deposit had been made and the parties had united in preparing the case for hearing and final decree.

Where after bill and answer the parties had consented to and reduced to writing a compromise, it was held that the written agreement "might be regarded by the Court as tantamount to an amended answer and as evidence of the facts embodied in it, sufficient to base a decree thereon." *Horton vs. Baptist Church*, 34 Vermont, 309. And see 5 Encyc. of Pl. & Pr., pp. 960-62, and notes.

The situation is intensified by the fact that the decision of the Court of Appeals in respect to the question now under consideration, rendered in this case on the 4th day of November, 1912, was, at least in the opinion and judgment of the appellants and their counsel, directly opposite to the rule which had previously been laid down by that Court for the guidance of suitors and counsel, under practically similar circumstances, even in the absence of consent or anything in the nature thereof, in *Gilbert vs. Washington Beneficial Endowment Association*, 10 App. D. C., 316, decided February 10, 1897, with no intervening decisions by the Court to indicate any change in its views as to the proper practice under like conditions.

In *Gilbert vs. Endowment Association*, the bill of complaint, filed by the association, sought to annul a conveyance of its assets made by its officers to another company, on the ground of fraud in the procurement of the deed. The bill (10 App. D. C., 338), was not filed for the benefit of either the creditors or the certificate holders of the Association, but for its own benefit and to enable it to continue to carry on the business in which it had been engaged, from which continuance it had been disabled

by the attempted conveyance of its assets. The court below declined to grant the specific relief prayed; but, the assets of the Association having been converted into money, and conditions having arisen which made it impracticable to continue its business, its decree undertook distribution of the assets among the creditors and shareholders, and, in the Court of Appeals, the objection was made that the bill afforded no proper basis for a decree of that character. The contention was overruled by that Court, which declared (pp. 338-9):

"Inasmuch as there is a fund in court to be disposed of to the person or persons to whom it equitably and justly belongs, and as it was in the power of the court to direct the reformation of the pleadings so as to conform to the development of the testimony, it does not seem proper that, for technical imperfections of pleading, if such there be, substantial justice should be refused to be done. And the substantial question in this case is—to whom does the fund in court equitably and justly belong? The pleadings and the testimony fairly present that question."

So, in the case at bar, the consent decree, the action of the appellee in pursuance of it, and her answer, in effect placed in the hands of the Court a fund for distribution, subject only to a determination in the cause of the question "to whom does the fund in court equitably and justly belong?" Except in the particular above pointed out, namely, the consent decree and the features of the answer in this case above pointed out, which were wholly lacking in the case cited, the cases are precisely parallel. No intimation had fallen

from the Court, in the intervening years, that the rule thus laid down by it in *Gilbert vs. Endowment Association* would not be adhered to; the appellee had proceeded throughout the taking of the testimony and to final hearing without the slightest suggestion that any amendment was necessary, and the Supreme Court of the District of Columbia considered the record before it a proper one upon which to determine whether the plaintiffs were entitled to recover, and what sum was reasonably due them (Rec., pp. 235-6).

To hold, under these circumstances, that the bill must have been amended, in departure from its own ruling in *Gilbert vs. Endowment Association*, it is submitted was erroneous.

III.

Does Section 3477 of the Revised Statutes Preclude Relief?

The only provision of the McGowan contract (Rec., pp. 2-3) which can be relied upon as bringing it at all within the provisions of Section 3477 is the following:

“And in consideration of the professional services rendered, and to be rendered by the party of the second part, and others who may be employed in the prosecution of said claim, the party of the first part agrees and hereby binds himself, his heirs and legal representatives, to pay to the party of the second part, his heirs and legal representatives a fee equal in amount to fifteen (15) per centum of whatever sum of money or other evidence of indebtedness may be awarded or collected on account of said claim. It is likewise

agreed that the party of the second part shall have control of the prosecution of said claim to its final determination, with power to receive and receipt for any draft or other evidence of indebtedness, which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated."

The provision that Mr. McGowan should have control of the prosecution of the claim to its final determination amounted to no more than the grant of an irrevocable power, which species of a power of attorney, whether or not it is in fact irrevocable, has never yet been held to be a violation of the section in question. The validity of contracts for the payment of a contingent fee in the prosecution of claims against the United States, with the resulting right to payment of the fee from the proceeds realized, has been repeatedly recognized by decisions of this court, presently to be referred to. The only feature of this McGowan contract which does fall within the prohibition of the statute is the grant of a power to receive and receipt for the draft which might be issued in payment of the claim, which power was not sought to be asserted and the validity of which forms no part of the controversy in this case.

The contract between Mr. Parish and Mr. Brookshire (Rec., p. 4), in the particular now under consideration, was as follows:

"I hereby agree to pay to said Brookshire a sum equal to 5 per centum of the amount awarded or appropriated for the payment of said claim. This contract to be an order upon the proper officer of the Government, or any one authorized to dis-

burse said award so appropriated, and it is expressly understood that said Brookshire shall have a lien for the amount due him upon the amount of said award, *when the same is made.*"

So much of this contract as provides that it should be an order upon the disbursing officer of the Government for the payment of the stipulated fee, it is conceded, is prohibited by Section 3477, under the decision of this Court in *Nutt vs. Knutt*, decided subsequently to the Brookshire contract. So much of it as undertakes to give a lien upon the amount of the award, *when the same is made*, is no more, we submit, than a provision that the stipulated contingent fee shall be paid out of the proceeds of the award, after it has been made, and is not justly subject to the charge of illegality. That which in some of the authorities is designated as the attorney's lien, is in others declared to be an equitable right to be paid out of the fund or property created or secured by the attorney's services, which lien or right, created by operation of law, can not be destroyed by a mere recognition of it in the contract between the parties. Language expressing only what the law, without it, implies, can not create illegality (see *infra*, p.).

The objection under consideration, even if otherwise capable of being sustained, is thus dealt with, we submit correctly, in the opinion of the Supreme Court of the District of Columbia:

"As to the second objection, that the contracts were null and void as against the statute, so far as they attempted to give a lien upon the fund sought to be recovered.

"The first question is whether this objection is one that can be taken, in view of the consent-decree. That declares that the fund paid into the court shall be held 'subject to the determination by the court whether any amount, and, if so, what amount, is justly due the complainants, or either of them, for professional services rendered by them or either of them for and in respect of the matters described in the bill of complaint.' No other question is reserved. What shall be done with the fund is declared to depend upon these two questions alone—is anything due? If so, how much? No question touching the existence of a lien upon the original fund is reserved or mentioned. The bill is brought charging that a lien existed, and charging that the defendant was insolvent and was about to remove from the jurisdiction taking the fund with her, and that she had declared her purpose to prevent the plaintiffs from realizing anything upon their claims. With no denial of these claims upon the record—before any answer is filed—the defendant consents that a portion of the fund in question shall be paid into court, and be held by the court subject only to the determination whether she owes the plaintiffs anything upon their claims for professional services rendered, and, if so, how much? Can there be any doubt that thereby she has eliminated the question of a lien upon the original fund, and consented that, if there is anything due the plaintiffs, they shall be satisfied out of the fund paid into court? We think not. After such a decree, we think, it was not open to the defendant to raise by her answer any question touching the validity of the contracts in respect to a lien. That question had been waived. It is not maintained

by the defendant that the contracts were void so far as they provided for the rendering of services by the plaintiffs and for their receiving compensation therefor. That question is settled by *Nutt vs. Knutt*, 200 U. S., 12. Hence we fail to see what the statute has to do with the case in its present posture."

And in discussing the action of this court in *Price vs. Forrest*, 173 U. S., 410, 423, 424, Mr. Justice Stafford further said:

"The objection was made that the appointment of the receiver could not operate to transfer the fund, because that would be contrary to Rev. St. 3477; but the court held that such a transfer was one by operation of law and did not come within the statute. The object of the statute, the court said, was, not to protect the claimant, but to protect the Government, and to prevent frauds upon the Treasury. (See page 423.) We quote: 'There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims

against the United States. If a court, in an action against such claimant by one of his creditors, should, for the protection of the creditor, forbid the claimant from collecting his demand except through a receiver, who should hold the proceeds subject to be disposed of according to law under the order of the court, we are unable to say that such action would be inconsistent with section 3477. Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of the court appointing the receiver would be null and void, as between those who are parties to the cause and are before the court. In the present case the question arises solely between the principal parties. They have placed in the hands of the court a fund, which, as between them, the court would have had a right to take into its custody even against the objection of the defendant. There can be no question, then, touching the jurisdiction and power of the court to make the decree in this cause. Treating the question, therefore, as affecting only the plaintiffs and the executrix, are not the plaintiffs entitled to a lien upon the fund, if they are entitled to anything, for professional services in producing the fund? Upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor they have a lien upon it to the extent of the compensation they are entitled to receive. *Mechem on Agency*, sec. 868; 4 Cyc., 1005. For these reasons we do not feel embarrassed by Section 3477 in dealing with the case as equity may require."

The opinion of the Court of Appeals does not attempt to refute this reasoning of the Supreme Court of the District. It goes no further than to declare (Rec., p. 282) that contracts like those set out in the bill, "in so far as all events as they attempt to assign, or create a lien upon a claim against the United States, are prohibited by Section 3477, R. S., and are thereby made absolutely void," citing *Nutt vs. Knutt*, 200 U. S., 12, 21, and *Bank vs. Downie*, 218 U. S., 345, neither of which cases is in conflict with the relief granted by the decree of the lower court.

An analysis of the cases in which this Court has had before it for consideration Section 3477 shows that this case comes, not within the principle of that line of decisions beginning with *Spofford vs. Kirk*, 97 U. S., 484, and ending with *Bank vs. Downie*, 218 U. S., 347, but rather within the principle of that line of decisions beginning with *Bailey vs. U. S.*, 109 U. S., 432, and ending with *Price vs. Forrest*, 173 U. S., 410.

All the cases in this Court in which Section 3477, has been an element in the decision are here grouped under two heads:

A—Those cases in which contracts relating to or assignments of claims against the United States have been held to be *within* the prohibition of Section 3477 of the Revised Statutes.

B—Those cases in which contracts relating to or assignments of claims against the United States have been held to be *not within* the prohibition of or affected by Section 3477.

A.

(Cases within Section 3477.)

- U. S. *vs.* Gillis, 95 U. S., 407.
 Spofford *vs.* Kirk, 97 U. S., 484.
 McKnight *vs.* U. S., 98 U. S., 179.
 St. Paul, etc., Ry. Co. *vs.* U. S., 112 U. S., 733.
 Hagar *vs.* Swayne, 149 U. S., 242.
 Ball *vs.* Halsell, 161 U. S., 72.
 Bank *vs.* Downie, 218 U. S., 347.

B.

(Cases not within Section 3477.)

- Wright *vs.* Tebbets, 91 U. S., 252.
 Erwin *vs.* U. S., 97 U. S., 392.
 Goodman *vs.* Niblack, 102 U. S., 556.
 Bailey *vs.* U. S., 109 U. S., 432.
 Hobbs *vs.* McLean, 117 U. S., 567.
 Savings Herd, etc., Assn. *vs.* Shepard, 127 U. S.
 494.
 Butler *vs.* Goreley, 146 U. S., 303.
 Price *vs.* Forrest, 173 U. S., 410.
 Nutt *vs.* Knut, 200 U. S., 12.

In all the cases in Group A, there was a clearly defined assignment of a claim against the United States, or of an interest therein, an assertion of rights based upon that assignment, and an immediate refusal by the officers and agents of the United States (with the exception of one case, to be noted), and the party against whom the assignment is sought to be enforced, to recognize any rights growing out of the assignment. In other words, in

each of these cases, the assignment was within the purview of the statute and in each case the parties who had the right to refuse to recognize or give effect in any way to the invalidated assignment, exercised that right at the first opportunity.

Thus in *U. S. vs. Gillis* (supra), a claim was attempted to be prosecuted in the Court of Claims by an assignee of the claim, in his own name, and the United States, refused to recognize the claimant, the assignee, because of Section 3477. In this it was upheld by this Court.

In *Spofford vs. Kirk* (supra), Kirk, the claimant, drew certain orders upon his attorneys, Hosmer and Company, to be paid out of the proceeds of his claim against the United States, which had not at the dates of the orders, been allowed. These orders were subsequently and before issuance of the Treasury warrant, assigned to Spofford. Kirk having refused to endorse the warrant or admit the validity of the orders, Spofford filed his bill in equity in the Supreme Court, to enjoin Hosmer and Company from surrendering, and Kirk from receiving the warrant. The theory of the bill of the complainant's case was that Spofford had an equitable lien upon the proceeds of the claim, by virtue of his assignments. The Court held that the assignments did create a lien upon the funds, but as the assignments were invalid, by reason of Section 3477, the liens fell to the ground. The statute, the Court said, "embraced alike legal and equitable assignments." The Court, therefore, following *United States against Gillis*, affirmed the decree of the Court below which had dismissed the bill.

It is to be observed that, in this case, the officers of the Treasury Department had delivered the warrant to Hosmer and Company as agents and attorneys for Kirk, and accordingly were not made parties to the suit.

In *McKnight vs. United States* (98 U. S., 279: 1878), one Hart assigned a claim against the United States for supplies furnished the army to McKnight and Richardson. The proper accounting officers of the Treasury awarded them as assignees, the sum of \$30,000, of which \$21,000 was paid and \$9,000 withheld by direction of the Comptroller of the Treasury. McKnight and Richardson sued in the Court of Claims to recover this sum and the United States set up a counter-claim, insisting upon their right to recover back the \$21,000 which had already been paid the petitioner. The Court held, affirming the Court of Claims, that neither party could recover. The petitioners could not, because the basis of their claim was the assignment, which was void, under the statute; and the United States could not because, though the assignment had been void, yet it had been acted upon by the United States, "and there was nothing contrary to good morals or conscience in the payment or receipt of the money."

As to the effect of the statute on the assignment the Court follows *Spofford vs. Kirk*.

This case might not improperly be placed in Group B as well as Group A, for it recognizes and acts upon the proposition that the proper officers of the United States may, in spite of the prohibition of the statute, give validity to an assignment by paying over the proceeds of an assigned claim to the assignee rather than to the

original claimant, and that such a payment will be binding on all parties.

In *St. Paul and Duluth Ry. Company vs. U. S.* (supra), the claimant in a suit against the United States based his title to the subject-matter of the claim on a purchase at a judicial sale under a mortgage which covered the claims against the United States. Payment of the claims was resisted by the United States on the ground that the transfer of the claims by way of mortgage was an assignment within the meaning of Section 3477, and this Court so held.

It is to be observed that here, as in the *Gillis* case, the United States, through its proper officers, set up the invalidity of the voidable assignment.

Hager vs. Swayne (supra) was an action by Swayne who had purchased certain claims growing out of the assessment of customs alleged to have been illegally assessed, to recover from Hager, collector of the port of San Francisco, the amount of the claims.

The Court held that no action could be maintained upon an assignment made only for enabling the assignee to bring suit. After pointing out that Section 3477 has been held not to include transfers by operation of law or by will, or in bankruptcy or insolvency, the Court said: "But the legislation shows that the intent of Congress was that the assignment of naked claims against the Government for the purpose of suit, or in view of litigation or otherwise, should not be countenanced." Here again, however, the suit was, in effect, a suit against the United States. It was defended by an officer of the

United States who might rightfully, indeed who was bound to, invoke the defense of the statute.

In *Ball vs. Halsell* (supra), Halsell gave Ball power of attorney to prosecute a claim growing out of Indian depredations. Before the claim was finally allowed Congress, in the act authorizing the payment of such claims, declared void contracts for attorney's fees, although Ball had been allowed an attorney's fee by the judgment of the Court of Claims. He brought an action on his power of attorney, by which Halsell had agreed to give him one-half of the amount that might be recovered from the Government.

The Court held that the contract which was made invalid by the act of 1891, providing for the payment of the Indian depredation claims, and also by Section 3477 of the Revised Statutes, might be disregarded by Halsell, or treated as absolutely null and void in any contest between him and his attorney.

But Mr. Justice Gray, who delivered the opinion of the Court, said, after citing *Marshall vs. B. & O. Railroad Co.*, 16 How., 314:

"And the act has since been held by this Court to include all specific assignments, in whatever form, of any claim against the United States under a statute or treaty, whether to be presented to one of the executive departments, or to be prosecuted in the Court of Claims; and to make every such assignment void, *unless it has been assented to by the United States.*"

The effect of this decision is therefore to hold, as this Court has always held, that contracts and assignments

prohibited by Section 3477 are *voidable* at the option of the assignor or promisor, or at the option of the United States, and if not avoided are, or may be, valid.

In *National Bank of Commerce vs. Downie* (supra), Gamwell and Wheeler held certain unallowed claims against the United States. They became bankrupt, and Downie was appointed receiver and subsequently trustee. The firm had attempted to assign their claims against the United States to two banks to secure advances. It was held that these assignments came within the prohibition of Section 3477 and were void, and that upon the bankruptcy of Gamwell and Wheeler their claims, along with their other assets, passed to and became vested in their receiver and trustee in bankruptcy.

There, of course, the invalidity of the assignments was set up by the trustee of the bankrupts, who was in privity of title with them.

In each case, within this group, therefore, the statute was invoked either by the proper officers of the United States, or by the assignor or his privy, and in each case it is recognized that an assignment or contract prohibited by Section 3477 is not void but voidable, and may be given effect or ratified, as was done in the present case by the consent decree.

Coming now to those cases classified in Group B in which it was held, that Section 3477 did not apply, we find that in each one of them, except two, *Wright vs. Tebbets*, 91 U. S., 252, and *Nutt vs. Knut*, 200 U. S., 12, the contention was made that a contract or an assignment was void and conferred no rights, or did not constitute a defense.

The cases in this group may be divided into three sub-groups.

1. Those in which it was not claimed that the contract in question gave rise to a lien on or an equitable assignment of a claim against the United States;

2. Those in which, by reason of the nature or kind of the assignment relied upon, the Court held the statute not applicable, and—

3. Those in which the Court held the statute not applicable because the United States chose to recognize and give effect to the assignment.

Sub-Group 1.

Wright *vs.* Tebbets, 91 U. S., 252.

Nutt *vs.* Knut, 200 U. S., 12.

Each of these cases was an action to recover a sum due under an attorney's contract for professional services rendered in the prosecution of a claim against the United States. Each was an action at law to recover the sum stipulated to be paid. In neither was any lien on the fund relied upon. Consequently, there being no question of any assignment, as such, but only of a right to recover for services rendered, there was no occasion to consider or apply in any manner, the prohibitions of Section 3477. This Court, however, in discussing the Nutt case, points out that the contract, though it specifically provided for a lien, was not on that account void, for the lien was not relied upon. These two cases, therefore, though each held that Section 3477 was inapplicable, throw no light on the issues in the present case,

for in neither is there any claim of equitable assignment or lien growing out of a contract, except, as to the Nutt case, to the extent remarked upon by Mr. Justice Stafford in his opinion.

Sub-Group 2.

STATUTE NOT APPLICABLE BECAUSE OF NATURE OR
KIND OF ASSIGNMENT.

Erwin *vs.* U. S., 97 U. S., 392.

Goodman *vs.* Niblack, 102 U. S., 556.

Hobbs *vs.* McLean, 117 U. S., 567.

Butler *vs.* Goreley, 146 U. S., 303.

In Erwin *vs.* U. S. (*supra*), Section 3477 was held not applicable because the assignment questioned was an assignment to a trustee in bankruptcy.

The statute, the Court said, applied only to voluntary assignments, not to the passing of claims to heirs, devisees, or assigns in bankruptcy.

In Goodman *vs.* Niblack (*supra*), Section 3477 was held not applicable because the assignment attacked was an assignment for the benefit of creditors, and therefore, following the Erwin case, was held to be not within the purview of the statute.

In Hobbs *vs.* McLean (*supra*) the same principle was followed with regard to articles of partnership: "It is obvious," said the Court, "that Section 3477, which forbids assignments of claims against the United States or any interest therein unless under certain circumstances therein stated, can have no reference to such a contract as the partnership articles between Peck and the plaintiffs."

It was in this case that this Court said, referring to Sections 3477 and 3777 of the Revised Statutes:

"They were passed in order that the Government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and the settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract, after the contract had been performed."

In *Butler vs. Goreley* (supra), it was held, following the principle of the other cases cited in this sub-group, that a voluntary assignment for the benefit of creditors, recognized by the accounting officers of the United States and honored by them, did not come within the prohibition of the statute.

Sub-group 3.

STATUTE NOT APPLICABLE BECAUSE UNITED STATES CHOSE TO RECOGNIZE AND GIVE EFFECT TO ASSIGNMENT.

Bailey vs. U. S., 109 U. S., 432.

Freedman's Sav. and Tr. Co. vs. Shepherd, 127, U. S., 494.

Price vs. Forrest, 173 U. S., 410.

In each of these cases, the Court held that an assignment, though literally within Section 3477, yet might, with the consent of the United States, acting through its officers and agents, be given effect under the circumstances presented. The theory of these cases is that the statute was enacted for the protection of the United States, and that, in cases where only third parties

are interested, the accounting and other officers of the United States may waive the rights which the statute gives to the United States and pay the proceeds of the claim under an assignment, otherwise void, to the assignee.

In *Bailey vs. the United States* (supra), one Godefroy was given a power of attorney authorizing him to receive the proceeds of a claim against the United States by the claimants, Bailey and others. Subsequently, in 1870, an act of Congress authorized the payment of a sum of money to the claimants, and, after the account was stated at the Treasury Department, Godefroy, acting under the power of attorney, demanded and received a draft for the full amount of the claim. He never paid the proceeds of the claim over to his principals and this action was brought to recover the amount thereof from the United States upon the theory that the power of attorney was void being in violation of the act approved July 29, 1846 (9 Stat., 41), and the act approved February 26, 1853 (10 Stat., 170), which were subsequently embodied in Section 3477 of the Revised Statutes.

The Court held that, if the officers of the Treasury choose to make payment to a person whom the claimant, by formal power of attorney, authorized to receive payment, the claimant can not be permitted to impeach the settlement had with his agent, and the payment is good.

The Court distinguishes *United States vs. Gillis*, and *Spofford vs. Kirk*, upon the ground that those cases decided only that an assignee of a claim can not proceed against the United States, basing his right to recover on the assignment. It is said that, in such cases, the statute

is operative in rendering the assignment void. The Court says, referring to the Spofford case:

"No question arose in that case as to what would have been the effect upon the rights of the claimant had the officers of the Government recognized the assignment of Spofford."

The Court calls attention to *Erwin vs. U. S.* (97 U. S., 392), and *Goodman vs. Niblack* (102 U. S., 556), and follows the principle of those cases that the statute does not make void all powers of attorney and contracts which come within its purview. On the contrary, as the statute is for the protection of the Government only, a contract or an assignment recognized and acted upon by the parties or by the officers of the Government may still be good and enforceable.

In *Freedman's Savings and Trust Company vs. Shepherd* (*supra*), the question was whether or not the assignment of a lease of certain real estate to the United States, and of the rents accruing under the lease, was an assignment of a claim against the United States within the meaning of Section 3477.

The Court held that, though the assignment of the lease and the rents under it was undoubtedly an assignment of a "claim upon the United States," yet the statute was not intended to apply to such an assignment because:

"The object of the statute, as was said in *Bailey vs. United States* (109 U. S., 432), was to protect the Government and not the claimant, and to prevent frauds upon the Treasury; and that 'an effectual means to that end was to *authorize* [*italics ours*] the officers of the Government to

disregard any assignment or transfer of the claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof.' "

The Court then points out that the officers of the Government had *chosen* to recognize the assignment in question, and that of their action the parties to the assignment could not rightfully complain.

In *Price vs. Forrest* (supra), the facts were as follows:

In August, 1892, the claim of Price against the United States was adjusted by the Secretary of the Treasury and there was found due Price the sum of \$76,000. Long prior to this Forrest had recovered a judgment against Price in the Supreme Court of New Jersey for the sum of \$17,000. Forrest died in 1860, intestate, and the suit was kept alive by his wife by a bill of revivor. The bill prayed for discovery and asked that Price be enjoined from assigning any of the real estate and property to which he was entitled. The defendants to the bill, Price, his wife and son, filed an answer denying that Price owned or had any interest in the properties mentioned in the bill. Nothing more was done in the case until 1892, when Mrs. Forrest, as administratrix filed a petition stating that they had been unable to find any real or personal property of Price, but that they had lately learned that \$45,000 was to be paid to Price by officials of the Treasury, and the prayer of the petition was that a receiver be appointed to receive the draft about to be issued and that Price be ordered upon the receipt of the draft to endorse the same to the receiver. Upon the presenta-

tion of the petition, the Chancellor issued a rule upon Price to show cause why the prayers should not be granted, and an injunction issue, and a receiver be appointed. Rule was served upon Price on the 10th of August, 1892, but, after that date, he received from the Assistant Treasurer, at Washington, four drafts in the aggregate sum of \$45,000, leaving in the hands of the United States, \$31,000.

On the 10th of October, 1892, one Borchering was appointed receiver in said cause to demand and receive all the property of Price, especially the said four drafts, and it was made the duty of the receiver to hold the drafts subject to the further order of the Court, and Price was enjoined from making any endorsement or appropriation of the drafts other than from the receiver. The Court issued an attachment against Price for contempt. By an order of May 18, 1894, the Court held him to be guilty of contempt and directed him to pay the receiver the sum of \$41,000, and a fine of \$50 and costs. As to the balance withheld by the Government, it was at first thought that there was a counterclaim against Price, but it was afterwards determined by the officers of the Government to pay the balance. The Chancery Court made another order on the 18th of May, 1894, by which Price was directed to execute two instruments in writing, one of them consenting that the balance from the Government should be paid to the United States, and by the other, assigning all of his property. Price died June 8, 1894, without complying with either of these orders. He left no will and no application was made for the appointment of an administrator, but letters ad prosequendum were granted to one McDermott.

A bill was filed in the Chancery Court July 5, 1894, in the name of the administratrix of Samuel Forrest and of the receiver, Borchering. The principal defendants were the children and heirs of Price.

This bill set forth that the defendants had executed a power of attorney to the defendant Fay, authorizing him to apply to the Secretary of the Treasury for the balance due Price; that in addition to the four drafts already issued, the further sum of \$9,000 had been paid to Price, and it was further alleged that the officials of the Treasury Department were desirous of doing right and justice in the premises; a demand had been made by the receiver upon the Treasurer of the United States for the payment to him of the balance of the money, and that the Treasurer neither consented nor refused to do so, but awaited the determination by some lawful tribunal of the right of the receiver in the premises. The prayers of the bill were for a revivor of the bill of 1874, that the defendants be enjoined from making any demand upon the United States and from receiving any part of the moneys awarded and that the parties be decreed to pay the plaintiff Borchering, receiver, any moneys that may have already been received. After a plea had been overruled, answers were filed in which the defendants denied the jurisdiction of the Chancery Court. The case was finally heard upon bill and answer, and a decree was entered enjoining defendants from making a demand on the Government of the United States, or its officers, and from receiving any money remaining in the Treasury of the United States.

It was contended that the orders of the State Court attempted to transfer or assign the Price claim against the United States and were in violation of Section 3477.

The Court held, however, after reviewing the various cases decided by this Court in which Section 3477 was under review, that that Section could not apply to the case under consideration.

The Court said (page 423):

“As this Court has said, the object of Congress by Section 3477 was to protect the Government, and not the claimant, and to prevent frauds upon the Treasury. *Bailey vs. United States*, 109 U. S., 432; *Freedman's Savings Co. vs. Shepard*, 127 U. S., 494, 506. There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States. If a court, in an action against such claimant by one of his creditors, should for the protection of the creditor forbid the claimant from collecting his demand except through a receiver who should hold the proceeds

subject to be disposed of according to law under the order of the court, we are unable to say that such action would be inconsistent with Section 3477."

The present case comes fully and fairly within the principle of the three cases classified in Sub-Group Three of Group Two, the Bailey case, the Freedman's Savings Company case and the Price case.

In each of those cases there was a recognition of a power of attorney or assignment by the officers of the Government, an acting upon it, and in each case the power of attorney or assignment (except possibly in the Price case) came within the statute. Yet in each case this court held that, since the statute was passed for the benefit and protection of the Government, not of the claimant, the recognition of it by the officers of the Government gave it validity.

So here in the present case, we have a contract and an equitable assignment and lien growing out of that contract and services rendered thereunder. It may be conceded that this contract, in so far as it created a contract lien, came within the statute. But when the contract is brought into court and made the basis of the jurisdiction of a court of equity which is asked to exercise equitable remedies, and when in obedience to a decree of that court, entered by consent of the parties to the contract, the officers of the United States, seeing that the Government is protected, bring the fund, the proceeds of the claim which had been assigned, into court for adjudication, we say it is too late, after such consent and adjudication by the court, to invoke Section 3477

to overthrow the very contract which was, in part, the basis of the jurisdiction of the court.

In three States, courts whose opinions are entitled to great weight, following the principles of those cases classified in Sub-Group 3, of Group 2, have given to Section 3477, the construction we now contend for.

Jernegan vs. Osborn, 155 Mass., 207.

York vs. Conde, 147 N. Y., 486.

(See, also, *Conde vs. York*, 168 U. S., 642, in which this court dismissed a writ of error.)

Hawes & Co. vs. Trigg Co., 110 Va., 165.

In each of these cases, there was a specific assignment of moneys due a contractor with the United States, constituting claims against the United States, and in each case, the court, pointing out that the policy of Section 3477, as declared by this court, was only to protect the United States, held that such transfers may, when recognized or not objected to on behalf of the United States, be made in the legitimate course of business in good faith to secure an honest debt.

In commenting upon *Price vs. Forrest*, the Supreme Court of Appeals of Virginia, said in the Trigg case (*supra*):

"It will be observed that, in *Price vs. Forrest*, the fund came under the control of the State court by force of its decree appointing a receiver and requiring the debtor, Price, to whom the claim from the United States Government was due, to make an assignment to the receiver; and yet that was held not to be within the mischief sought to be remedied by Section 3477, that such an order would not interfere with the examination

and allowance or rejection of such claim by the proper officers of the Government, or in anywise obstruct any action such officers might legally take under the statutes relating to the payment of claims against the United States; a fortiori is the case not within the mischief sought to be remedied by Section 3477, when the Government, of its own accord, comes forward and by its voluntary act places within the custody of the State court the fund in controversy, receives a full acquittance of its obligations under the contract, and leaves the fund to be disposed of in accordance with the rights of the parties as ascertained by the courts of the State."

In *Conde vs. York* (supra), certain contractors, by specific assignment, assigned moneys due them from the United States to York and Starkweather. Notwithstanding this assignment the contractors made payment to Conde and Streeter. York and Starkweather brought suit against Conde and Streeter. One of the two defences set up was that the assignment to York and Starkweather was void as opposed to Section 3477.

The trial court, the General Term of the Supreme Court, and the Court of Appeals of the State of New York held that Section 3477 had no application to a transaction such as this.

The case was sought to be brought before this court by writ of error upon the ground stated by Mr. Chief Justice Fuller as follows:

"Plaintiff in error contended in the courts below that they were entitled to the fund in question by virtue of an oral transfer prior to the assignment to defendants in error, and of the writing executed

subsequently thereto; and that defendants in error acquired no right to the fund by their assignment because such assignment was in violation of Section 3477 of the Revised Statutes of the United States. But they did not claim that they acquired any right or title to the fund by reason of that section, nor was its validity questioned in any way."

After quoting at some length from the opinion of the Court of Appeals of New York, this court in denying its jurisdiction over the controversy said:

"Many decisions of this court in respect of Section 3477, were then considered, and the conclusion reached that the section had been so construed as to permit transfers made in the legitimate course of business, in good faith, to secure an honest debt, while they might be disregarded by the Government, to be sustained as between the parties so far as to enable transferees, after the Government had paid over the money to its contractors, to enforce them against the latter, or those taking with notice. The court held, in effect, that such was the transaction in the case at bar, and that the transfer to York and Starkweather was simply to secure them for material actually used by the contractors in performing their contract with the Government, and amounted to nothing more than the giving of security, and not to the assignment of a claim to be enforced against the Government. The United States, had in due course, paid over the money to the contractors, and between them there was no dispute; nor had the United States any concern in the question as to which of the rival claimants was entitled to the fund, the

proper distribution of which depended on the equities between them. What the New York Courts determined was that the equities of York and Starkweather were superior to those of Conde and Streeter, and judgment went accordingly.

"In order to give this court jurisdiction to review the judgment of a State court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not a third person only; and the statute or authority must be directly in issue. In this case, the controversy was merely as to which of the claimants had the superior equity in the fund; that statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it."

It is submitted that the consent decree, and the action of the officers of the Government in recognizing the rights of the complainants as made out in the bill, and in acceding to the mandate of the decree by recognizing the power of attorney executed by the defendant Parish, to Corcoran Thom and delivering to him a draft for \$41,000, to be held by the American Security and Trust Company to await the adjudication of the rights of the parties by the Court, placed this case squarely within the doctrine and principle of the Bailey case, and the Freedman's Savings Co. case and is exactly parallel with *Price vs. Forrest*.

IV.

Did Appellants Abandon Their Contracts?

The contention that the appellants abandoned their contracts, which is the final ground upon which the Court of Appeals based its decree, is rested by it upon the following letter from Parish to McGowan, dated September 15, 1904, and the fact that McGowan is not shown to have made a written reply to it:

“WASHINGTON, D. C., *Sept. 15, '04.*

“Hon. J. H. McGOWAN.

“MY DEAR SIR AND FRIEND: Your letter of the 25 ult. received in due time and contents noted, which I answered best I could but have no answer thus far to hand and will repeat in substance what I wrote, to wit: You will remember before you left Washington, for your summer respite, you said substantially that you had done your best to get the Auditor's report in my case paid by the Secretary of the Treasury, and failed, etc. 'that you turned over to me the case to be managed in the future and do whatever I deemed best, etc.' Sometime next Congress, I propose to organize a practical method and resurrect the claim from its unfortunate condition, and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore, I said that I would reimburse those who had advanced money to promote the case thus far, and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit: 'that you would be glad and well satisfied to get the money advanced me' returned. My

past record as to compensation—who had rendered me service you have not surely forgotten which was generous and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm who is doing business here, and in New York.

“Yours hastily,

J. W. PARISH,
217 A Street S. E.”

In holding abandonment proved by this letter, the Court of Appeals in its opinion (Rec., p. 288), said as follows:

“This letter either recited the truth as to McGowan’s surrender of the case before going to Ontario, or a deliberate falsehood. A slight circumstance supporting its truth is the letter asking return of the power of attorney and McGowan’s consent thereto. Another circumstance is found in the testimony of McKee, an impartial witness, who had been journal clerk of the House of Representatives, and in the year 1904 had resigned to practice law. About a week before his death, Parish asked the witness to take up his claim and several conversations were had. The witness called upon Mr. McGowan and asked him who were the attorneys of record. McGowan said that he had prepared it, and followed it up to the time it was rejected by the Secretary, and added: ‘I do not care who collects it, I want my fee out of it!’ If false, McGowan was under obligation to contradict it. It is probable that other counsel associated with McGowan were not aware of this letter; but, whether so or not, they are bound by his actions. . . . The letter to

McGowan, above recited, remained unanswered. If its recitals were true, no reply was necessary; if untrue, it should have been replied to promptly. The parties apparently met no more. On November 19, 1904, the following letter was mailed to Parish and received by him:

‘NOVEMBER 19, 1904.

‘MR. J. W. PARISH, 207 A Street S. E., City.

‘DEAR SIR: We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next, we shall proceed as we deem best under the ample authority which we have.

‘Yours truly,

‘J. H. MCGOWAN.

‘E. P. MOREY.

‘E. V. BROOKSHIRE.’

“Parish promptly replied to what he characterized as an ‘impudent and discourteous’ letter, giving notice that he would not submit to methods which he called ‘bulldozing.’ ”

That, as between individuals, Brookshire and McGowan would have had the right to proceed with the case for the collection of the proceeds of the award in which they had an interest, not merely under the terms of the contract with McGowan, but under the authorities relating to the right of attorneys under contingent fee contracts, seems established. *Steenburgh vs. Miller*, 11 App. Div., N. Y., 286. Whether that right existed as against the United States in view of Section 3477 of the Revised Statutes, is more doubtful. Certainly the right

of the attorneys, sought to be asserted in this suit, were not lost, as against either Mr. Parish or his estate, by their failure to attempt to proceed further after receipt of his reply (Rec., pp. 35-6) to their foregoing letter of November 19th.

The self-serving statement in the Parish letter of September 15th, that McGowan had turned the case over to him "to manage it in the future, and do whatever he deemed best" is not claimed, it will be observed, to be proved or corroborated in any way except (a) by McGowan's assumed omission to reply in writing; (b) by the prior compliance by McGowan with the request of Parish for the return of a power of attorney, and (c) by the testimony of the witness McKee as to what occurred between him and McGowan when, upon Parish's request that McKee undertake the prosecution of the suit, the latter called upon McGowan for further information as to the attorneys of record in the case.

(a) The conclusion of the learned court that the failure to reply to a letter is an admission of the truth of its contents, is not only not sought to be supported by the citation of authority, but is believed to be opposed by the unanimous current of authority upon the subject. Certainly the possession of an unanswered letter is not an admission of the truth of its contents.

Fairlie vs. Denton, 3 C. & P., 103, 14 E. C. L., 472.

Sullivan vs. McMillan, 36 Fla., 543.

Commonwealth vs. Eastman, 1 Cush., 189, 215.

Fearing vs. Kimball, 4 Allen, 125.

Waring vs. U. S. Telegraph Co., 44 How. Pr., 69.

This was the doctrine of the courts in the District of Columbia (*McGuire vs. Corwine*, 3 McA., 81), where the transactions occurred, and which it is reasonably to be presumed was known to Mr. McGowan, a lawyer practicing in that jurisdiction.

"An unanswered letter is inadmissible, although the statements contained in it are well known to the party to whom it was sent; and this is held on the ground that a letter written to a party by a third person, to which no reply is made, does not show an acquiescence in the facts stated in the letter. *Fearing vs. Kimball*, 4 Allen, 125, 128."

Commonwealth vs. Edgerly, 10 Allen, 184, 187.

Again, with respect to this letter of September 15th, even if, as we think the Court of Appeals mistakenly held, it imposed on McGowan an obligation to reply if its statements were untrue, it is hardly conceivable that any authority or any principle exists under which it can be claimed that the reply must be in writing; while the record is clear and convincing that McGowan, so far from acquiescing in the statement, repudiated it when the letter first came into his hands, and followed up that repudiation by every means in his power to secure an interview with Parish and authority from him to proceed with the case. He remarked in the hearing of the witness Serven, upon the suggestion of abandonment of the case by him, that "after working on it for all these long years, any man who would abandon the case when it was so near the finish of it must be a fool"—that the idea was perfectly preposterous after all the

years he had worked upon it—that he would not think of doing anything but carrying it through to the finish (Rec., p. 91). Mr. Serven adds, “He did not usually use that kind of language, and did not use harsh terms very often, but I remember he did at that time make use of this expression” (Rec., p. 91).

He did not return from his summer vacation, in Canada, to Washington until about the first of October (Rec., p. 90); and among his earliest acts was the renewal of his efforts to secure an interview with Mr. Parish with regard to taking the necessary steps to compel payment of the award, to which end he sent Mr. Morey to the house of Mr. Parish for the purpose of seeking such an interview, certainly as early as October 9, 1904 (Rec., pp. 44, 114, 177). Interviews for a similar purpose had been sought by Morey in September, with whom Parish made appointments for the purpose, which he did not keep (Rec., pp. 49-50; see also, 32-3, 34, 37-8, 44, 48).

(b) The circumstances attending the return of the power of attorney, referred to by the Court of Appeals in this connection, so far from corroborating the statement of the Parish letter that Mr. McGowan had abandoned or surrendered the case to him, it is respectfully submitted, tend directly to the contrary conclusion. That power of attorney (Rec., p. 215), was made shortly after the passage of the act of February 17, 1903, under which the claim was prosecuted to the award, and was accordingly nearly three years after the contract of employment. It contained no reference whatever to that contract, but simply conferred authority upon Mr. McGowan to be recognized as representing Parish's in-

terests before the Secretary of the Treasury and other departments. The letter of Parish requesting its return (Rec., p. 89), which bears date August 16, 1904, contains no suggestion whatever of the alleged relinquishment of the case by McGowan, which, if it had occurred, would have been the most obvious and natural ground upon which to base this request to return the power of attorney, but was as follows:

"WASHINGTON, D. C., *August 16, 1904.*

"Hon. J. H. McGOWAN.

"MY DEAR SIR & FRIEND: I have reached a point where it has become absolutely necessary for me to raise some money. The only asset I have as you know is my claim. If I am given a free hand I have good prospects of raising sufficient money to meet pressing demand at a reasonable cost. I would therefore ask that you return me the power of attorney which I gave you in my case. I make this request with no thought of not paying you for your services rendered and money advanced as soon as the claim is paid. I am to blame in not remaining in Washington when the Auditor signed report in my case and cause immediate action of officials as of yore, a rule I have proved in the past.

"I am your- truly,

J. W. PARISH.

"P. S.—I am glad your health is improving."

Whether the power of attorney was ever in fact returned does not appear, but McGowan's willingness to return it, not because he had retired from the case, but in order to enable Parish to effect a loan, if it could have

that effect, appears from his reply to the foregoing (Rec., p. 89), which was as follows:

DUDLEY, ONT., CAN., *Aug. 21, '04.*

"DEAR PARISH: Of course I do not have the power of attorney with me, but you may make any arrangement for a loan that you deem best.

"My recollection is that the last power of attorney you gave me was in blank and that I wrote in the name of another party and may have delivered it. I hope to be back before a great while.

Truly yours,

J. H. McGOWAN."

As will be seen from this correspondence, the only "free-hand" mentioned by Parish as his reason for desiring return of the power of attorney, was the absolute necessity for him to raise some money and his good prospects, if given a free-hand, "of raising sufficient money to meet pressing demands at a reasonable cost. I would, *therefore*, ask that you return to me the power of attorney which I gave you in my case;" and it is equally obvious that Mr. McGowan's willingness to return the power was, not with any view to the taking of the case out of his hands, or the employment of other attorneys in it, but that Parish might "make any arrangement for a loan that you deem best." The suggestion that any corroboration, however slight, of the claim of relinquishment first put forth in Parish's letter of September 15, nearly a month later, is to be found in McGowan's agreement to return the power of attorney, under the circumstances and pursuant to the correspondence quoted, we submit, is entirely untenable.

(c) The second circumstance, the conversation between Mr. McGowan and the witness McKee when the latter was applied to by Mr. Parish to represent him in the prosecution of the claim, is equally inadequate to prove abandonment, as will clearly appear upon the slightest consideration of the circumstances, under which the interview between McGowan and McKee took place. As shown *supra* (pp. ~~13-14~~¹⁷), McGowan and Brookshire had diligently sought the consent of Parish to institute proceedings for compelling payment of the award, their efforts to which end had been met by delay, evasion, and later by the refusal to meet them pursuant to their repeated requests. Despairing of securing an interview with him, or his cooperation in the matter otherwise, they wrote him under date of November 19, 1904, the following:

"We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next, we shall proceed as we deem best under the ample authority which we have."

This letter was replied to by Mr. Parish, under date of November 22, 1904, and therefore, under the authorities, stands upon a different footing from the unanswered letter of Parish to McGowan of September 15th, *supra*. In his reply, it will be observed, he does not deny the statement that Messrs. McGowan, and Brookshire had done what they could to secure an interview with him concerning his claim, or that he had deliberately avoided

them, nor does he pretend, in this letter, that they or either of them had retired from the case, or had consented in any way to its being taken out of their hands. On the contrary, his letter in substance is that they had "failed to materialize their wonderful talent to get Mr. Shaw to pay my claim," that there was no evidence that their ability or knowledge had improved the claim in any way, and that, if they proposed to carry out their "infamous threats" to proceed under the authority which they already had, they would "be met by a competent representative who will do doubt advise you to go slow for the next year or two."

Shortly after the date of this letter, because Mr. Parish died thirty-four days after its date, he applied to Mr. McKee to undertake professionally the realization of his claim, as he had the right to do under the provision of his contract with McGowan that the agreement should "not be affected in any particular by any revocation of the authority granted or which may be granted to the party of the second part, or by any services rendered or which may be rendered, by others, or by the party of the first part, his heirs or legal representatives or any of them." It was upon being applied to by another attorney whom Parish was seeking to employ, as he had the right to do, and after the latter's persistent and insulting refusal to permit McGowan to go on with the case, that Mr. McGowan used the language quoted by the Court of Appeals as corroborating abandonment by him of his rights under his contract; namely, that he had prepared the case and followed it up to its rejection by the Secretary, and that he did not care who collected it, he wanted

his fee out of it. How, under these circumstances, did his reply to McKee's question "corroborate" the claim that he had abandoned the case? What other reply, under the circumstances, could have been made by an attorney whose further service was forbidden by the client, but who, nevertheless, intended to insist upon his right to the stipulated compensation?

The burden of proof as to the alleged agreement between Parish and McGowan that the latter would surrender or abandon his contract rests, of course, upon the appellee, who asserts it. The only evidence in its support is the self-serving declaration to that effect contained in the letter of Mr. Parish of September 15, 1904; which declaration, we submit, so far from being corroborated by the other facts and circumstances in the case, is wholly inconsistent with any of them.

The denial of the right of Mr. Brookshire to compensation for his services, under the theory of abandonment, rests upon a proposition equally untenable, if not more so, namely:

"It is probable that other counsel associated with McGowan were not aware of this letter (i. e., the letter of Parish of September 15, 1904); but, whether so or not, they are bound by his actions."

Upon what possible theory or principle can the rights of Mr. Brookshire be held to have been defeated by a rescission or abandonment of the McGowan contract, by an agreement between the latter and Mr. Parish, to which Brookshire was not a party, and of which the

opinion of the court below concedes he probably had no knowledge?

The contract between McGowan and Parish (Rec., pp. 2-3) provided, in terms, that the latter might employ others in the prosecution of the claim of the former, whose compensation was to be included in the contingent fee of 15 per cent therein stipulated. Under this authority, Mr. McGowan made the contract with Mr. Brookshire which appears at pp. 3-4 of the record, under which Brookshire was to have one-third of the stipulated fee, pursuant to which arrangement Brookshire, with the knowledge and concurrence of Parish, gave his time and expended his labor upon the case until the Auditor's award, and thereafter before the Solicitor and before the Secretary until the final refusal of the latter to pay the award, after which he still continued to tender his services and ineffectually to seek the authority of Parish to pursue the matter further. How was it possible for Parish and McGowan, by any agreement between themselves, to which Brookshire was not a party, to deprive the latter of the 5 per cent of the award contracted for with him by McGowan, under his express authority from Parish to employ other counsel who should be compensated out of the 15 per cent specified in the contract between them?

In the second place, a month and a half after the foregoing contract between McGowan and Brookshire, Parish, himself, contracted directly with Brookshire, independently of McGowan and without reference to him, for a further contingent fee of 5 per cent upon the amount which should be awarded or appropriated for the

payment of the claim, in consideration of Brookshire's agreement to render necessary and proper legal services in the prosecution of the claim, "under the direction of said Joseph W. Parish." There is no pretense, in the pleadings or out of them, that Brookshire did not faithfully comply with the requirements of this contract, or that he refused at any time to render any services directed by Parish, nor is any agreement by him to abandon or retire from the performance of his contract even intimated. How, then, can his rights have been affected by the agreement between McGowan and Parish referred to in the letter of September 15th, even if that agreement were proved?

By the interlocutory consent decree, and again by her answer, the appellee submitted to the determination of the court, in this cause, whether any amount, and, if so, what amount, was "justly due the complainants, *or either of them*, for professional services rendered by them, *or either of them*, for or in respect to the matters described in the bill of complaint" (Rec., pp. 13, 17). Such a consent, as pointed out *supra*, p. 66, was equivalent to an amendment of the pleadings to that end, if amendment had otherwise been necessary.

We can not better conclude the discussion of this subject than by the following quotation from the opinion of the Supreme Court of the District, at page 235 of the record:

"Did the plaintiffs abandon and relinquish their right to prosecute, and their right to be compensated, under their contracts? It would certainly require very considerable evidence to convince us that the plaintiffs, after the time and

labor they had expended upon the claim, had intentionally abandoned it. Perplexing and embarrassing as the situation was, it certainly was not hopeless, from any point of view, and there is nothing in the evidence that convinces us that either of them ever intended to abandon, or ever gave the decedent or his executrix to understand that such was their intention. They had a right, as they were bound, to use their own best judgment and ability, and we are satisfied that if they had been fairly treated they would have continued in the management of the case. The attitude of the defendant and of her father towards them had been such as to make it difficult for them to proceed. They sought to have an interview with the decedent near the end of his life, when the course to be taken should be determined, and the interview was denied. In such circumstances it is not for the defendant to set up the proposition that they had abandoned their large interest in the claim. In her own course towards them she was apparently pursuing that which her father had mapped out for her, and ignored their relation to the claim, although she must have known in a general way what it was. There is no doubt that she knew they had been prosecuting the claim, and had been making advances on the strength of their relation to it. The contract between Parish and McGowan plainly contemplated that Parish himself or others whom he might employ might assist in the prosecution of the claim, although McGowan's right to compensation was not to be affected thereby. We think the plaintiffs had a right to understand that this course was being pursued, and to stand upon their right to compensation according to the terms of the contract."

Upon the foregoing considerations and authorities, it is confidently submitted that the case, as it was presented by the record at the hearing in the Supreme Court of the District, was a case of equitable jurisdiction; that the pleadings did not require amendment under the record as it then stood; that Section 3477 of the Revised Statutes interposed no obstacle to the relief granted by the lower court, and that the claim of abandonment of their contracts by the appellants is not sustained by the evidence. It follows that the decree of the Court of Appeals, reversing the decree below, can not be sustained upon any of the foregoing grounds, which are the only ones upon which that action is based by the opinion of that court.

Certain other objections to the decree below were urged by the appellee in the Court of Appeals, and may also be urged here, in view of which fact, a brief reference to them may be appropriate. These objections were:

V. That the testimony of the witnesses Morey and Serven was inadmissible.

VI. That, if otherwise entitled to recover, the compensation of the appellants should have been reduced by the services rendered by counsel employed by the appellee, which services lessened the labor appellants must otherwise have expended.

V. The Alleged Incompetency of the Witnesses Morey and Serven, Under Section 1064 of the Code.

The testimony of these witnesses is confined to two features of the case; first, the character and extent of the services rendered by the appellants in the prosecution

of the ice claim, and, secondly, their readiness and their efforts to procure the permission of Mr. Parish to render the further professional services made necessary by the refusal of the Secretary of the Treasury to pay the award.

As to the first branch of their testimony, the objection is untenable because, under the established construction of Section 1064 of the Code, even the appellants, themselves, were competent to testify as to the character and extent of the services rendered, its exclusion extending, only, to testimony by them as to the contract or understanding under which they were rendered (*Tuohy vs. Trail*, 19 App. D. C., 79)—a matter not in issue here, since the services were rendered under written contracts, duly signed by the testator, himself. Is evidence by Morey and Serven as to the continued readiness of McGowan and Brookshire to render the necessary further professional service, and their efforts to be permitted to do so, prohibited by it?

A brief history of sections 1063 and 1064, it is submitted, is of itself sufficient to dispose of this contention. Section 1063 embodies, simply, the provisions of the act of Congress of July 2, 1864 (3 Stats. at Large, 374), abolishing interest as a disqualification of witnesses, subject to certain exceptions, none of which embraces the case of the surviving party to a contract or transaction. Under the law as fixed by that act, Messrs. Brookshire and McGowan, themselves, would have been competent witnesses as to their conversations, contracts, and transactions with Mr. Parish, notwithstanding his decease. Nine months later, or on March 3

1865 (13 Stats. at Large, 533), an additional exception was enacted, now constituting section 1064 of the Code, as follows:

"If one of the original parties to a transaction or contract has, since the date thereof, died or become insane or otherwise incapable of testifying in relation thereto, the other party thereto shall not be allowed to testify as to any transaction with or declaration or admission of the said deceased or otherwise incapable party in any action between said other party or any person claiming under him and the executors, administrators, trustees, heirs, devisees, assignees, committee, or other person legally representing the deceased or otherwise incapable party,"

unless called to do so by the adverse party, or by the court, etc.

In other words, Congress, by its act of July 2, 1864, having opened the door, generally, to interested parties as witnesses, by its act of March 3, 1865, closed it only to the extent of excluding "original parties to a transaction or contract," where one of them had died, become insane, or otherwise incapable of testifying in relation to it, and the other party to it, or some one claiming under him, was suing upon it. The question, accordingly, is, was either Mr. Morey, or Mr. Serven, an original party to the transaction or contract of employment of McGowan and Brookshire by Parish, for the prosecution of his ice claim?

The contention on behalf of the appellant is an application to the judicial department of the Government to rewrite the section, in broader lines than the legislative

department wrote it in 1865, or has seen fit to rewrite it in the half century, nearly, which has since elapsed.

The act of 1864 abolished interest as a disqualification. The act of 1865 restored that disqualification only as to the original parties to a transaction or contract, one of whom had since died. The contention of the appellee is that the later act is to be construed as rejecting the former as to parties, and as to all witnesses. Where one of the original parties to the contract or transaction has died, it would have been easy for Congress to so provide in the latter act, if that had been the legislature's intent. What it did provide is essentially different.

As already shown in this brief in the statement of the facts of the case, with page references to the record, Mr. Morey was simply employed by Mr. Brookshire, after the latter's contract with Parish had been made, to assist Brookshire in the work the latter had undertaken to perform. There never was any contract or undertaking, at any time, on the part of Mr. Parish to employ Morey, or to pay him for any services he might render in the case (Rec., p. 51). There never was any transaction or contract by Morey to which Parish was "an original party," or a party at all; nor is Morey a party to the suit. The compensation of the latter is a matter exclusively between himself and Brookshire, with respect to which Parish made no contract, and with which neither he nor his estate is in any manner concerned.

A test is, is the bill defective because Morey is not made a party? If a party to the contract or transaction with Parish, he would be a necessary party to the suit,

which the appellant neither in her pleadings nor by her counsel contends; while, if not such a party, the section of the Code referred to is without application to him.

The objection to the competency of Mr. Serven as a witness is even more difficult of apprehension. He has no interest in the result of the suit (Rec., p. 79), and would have been a competent witness at common law.

VI. Was the Omission of the Lower Court to Make a Deduction From the Contractual Contingent Fee of McGowan and Brookshire, Because of the Professional Services of Other Attorneys Procured by the Appellee, Error?

In the first place, no claim of such a deduction is set up in the pleadings, or elsewhere in the record. It was first presented in the Court of Appeals, by way of objection to the decree of the lower court.

In the second place, if the appellee were entitled to a deduction on that account, the burden of proof is upon her to show the amount of the deduction claimed by her, or to which she was reasonably entitled. No such proof was given nor any data supplied by which the suggested deduction could be measured. In the absence of any evidence upon the subject, it was impossible for the court to fix upon the amount of, or to allow, such a deduction.

In the third place, the claim of such a deduction can be made, only, in the very teeth of the express terms of the written contracts between the parties. The McGowan contract (Rec., pp. 2-4), provides, in terms, that it "shall not be affected in any particular . . . by

any services rendered, or which may be rendered, by others, or by the party of the first part, his heirs or legal representatives, or by any of them;" while the Brookshire contract, as before pointed out, is (Rec., p. 4) for the rendition of "necessary and proper legal services in the prosecution of the above-described claim in the future, under the direction of said Joseph W. Parish," accompanied by no attempt at either proof or claim that Mr. Brookshire failed to render any services directed by Parish, the evidence being, on the contrary, that he diligently but ineffectually sought the permission of Mr. Parish to continue the rendition of all services necessary to enforce payment of the award.

If further reply to the objection now under consideration is necessary, it is to be found in the authorities, the great weight if not the unanimous current of which is that, where the failure to complete a professional service is due to the client's refusal to permit it to be completed, the attorney is entitled to the full compensation provided by his contract.

"The general rule as to damages in cases of breach of contract for personal employment is that the employee can recover only the difference between what he received or might have received from others and the price agreed upon. But the contract of employment of an attorney by a client is recognized as an exception to the rule. One reason for the exception is that such service is not easily partible or apportioned to the time or the labor performed or to be performed by the attorney. Another reason is that, often, the most difficult and valuable services of the attorney to his client are rendered in advising him of his legal

rights before any papers are prepared or appearances made in court. Another is that, by the contract, the attorney loses the possible opportunity of employment by the adverse party. Many cases hold that where, after preliminary services have been rendered under such a contract, the client, without valid excuse, discharged the attorney, the latter is entitled to recover the full contract price." (Citations.)

Kikuchi vs. Ritchie, 202 Fed., 857.

"Legal services are of this last-named character. They can not be apportioned either by time, or the amount of physical labor expended in drawing papers, attending courts, and oral arguments. It is the attorney's judgment, his learning, his responsibility and advice, which is relied upon, and which gives the peculiar value to legal services. Perhaps the most difficult and valuable services of the attorney may be rendered in considering his client's case, and giving him confidential information, before any visible act is done. These are general considerations, to show that the professional services of the attorney can not justly be apportioned by the plain and obvious mode indicated above for cases of other classes."

Brody vs. Watkins, 33 Ark., 545, 548.

"It is immaterial that other persons were also employed by the defendant, after the making of the contract, whose exertions may have contributed to the result. . . . If the contract was unjustifiably broken by the defendant declaring that he did not desire the plaintiff to continue his efforts to secure a pardon, the plaintiff was still entitled to recover, and the stipulated

compensation was the measure of his recovery. . . . This agreed and entire price was not for doing this or that specific thing, but for doing all that should be done to secure the result. If, upon the eve of success, or at any time after the plaintiff entered upon the undertaking, the other party assumed to put an end to the contract, it would be impossible to justly measure the plaintiff's damages by any apportionment of the sum agreed upon. . . . In any view of the case, no other reasonable and adequate measure of damages could have been implied than the stipulated compensation."

Moyer vs. Cantieny, 41 Minn., 242.

To like effect are—

Crye vs. O'Neal, 135 S. W. (Tex.), 253, 254, and citations.

Baldwin vs. Bennett, 4 Cal., 392.

Webb vs. Trescony, 76 Cal., 621.

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It is respectfully submitted that the decree of the Court of Appeals should be reversed, and the cause remanded with direction to reinstate the decree of the Supreme Court of the District of Columbia.

NATHL. WILSON,

J. J. DARLINGTON,

CLARENCE R. WILSON,

Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 150.

JOSEPHINE P. MCGOWAN, EXECUTRIX, ET AL.

v.

EMILY E. PARISH, EXECUTRIX.

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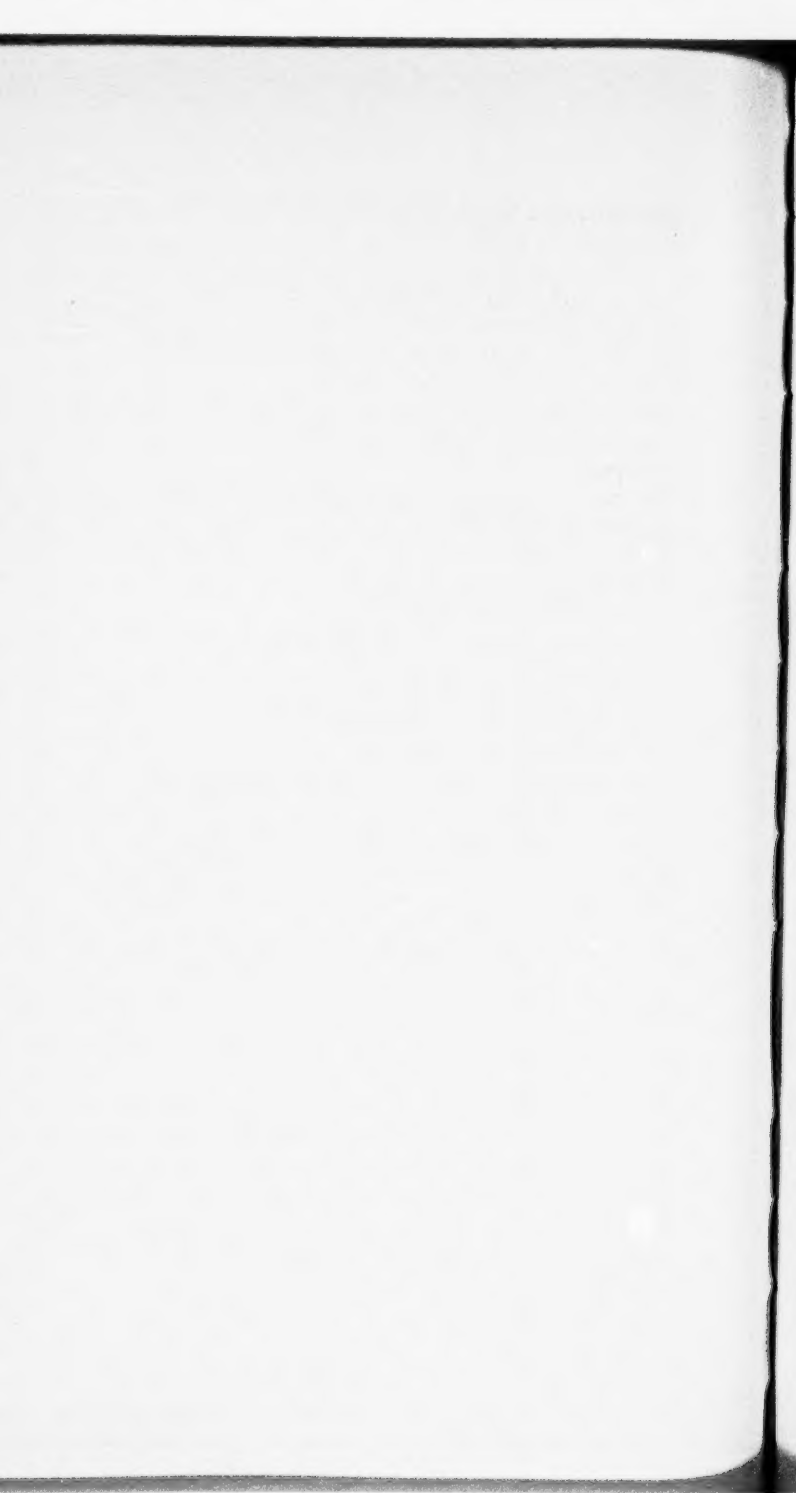
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Supreme Court of the United States

OCTOBER TERM, 1914

No. 150

JOSEPHINE P. MCGOWAN, EXECUTRIX OF JONAS H.
MCGOWAN, DECEASED, AND ELIZABETH V. BROOKSHIRE,
APPELLANTS,

vs.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH,
DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF APPELLEE.

I

HISTORY OF THE CLAIM

In March, 1863, J. W. Parish entered into a contract (made definite by the order of the Surgeon General's Office) to supply the Government during that year 30,000 tons of ice for the Medical Department of the Army, fully set out in *Parish vs. MacVeagh*, 214 U. S., 12. The Government refused to pay anything on account of the ice which had been bought and stored, but in consequence of the suspending order, not delivered. By an act of

May 31, 1872, Parish was authorized to bring an action in the Court of Claims to enforce his rights. Here it was held that the order did not constitute a contract. On appeal the United States Supreme Court reversed this judgment, but held that as Parish had made no tender of the undelivered ice he could not recover the profits under the contract, but only the money expended in the endeavor to fulfill it. The Court of Claims held that it could not reopen the case for additional evidence, but on that before it, awarded the claimant \$10,444.91. December term, 1879 (from October, 1879, to May, 1880), 15, Court of Claims. The attorneys for Parish in both courts were John B. Sanborn and R. P. Lowe (*Parish vs. U. S.*, 12 Court of Claims, 617; 100 U. S., 500). After a reference to the War Department to ascertain the facts, an act was passed directing the Secretary of the Treasury to pay to Parish \$58,341.85, in addition to what he had received, "being the balance of money laid out and expended by him, &c." (act of February 20, 1886; 24 Stat., 653-4).

How soon thereafter does not appear from the record; but during the last decade of the last century Parish brought before Congress his claim for the contract price, less the transportation price which had not been incurred. The record shows the report made to the House by Mr. Graff from the Committee on Claims of the 55th Congress, bearing date January 10, 1898, among other things stating: "It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation, that Parish never offered to deliver the ice." * * * On the false assumption that no delivery was tendered the court laid down the rule that the claimants were only "entitled to be paid for the ice that was lost." * * * In the case of the *U. S. vs. Behan*, 110 U. S., 338, which was decided four years later than the Parish case and which is now the rule, the court lays down the case as follows: * * * "All the present bill contemplates is a

final and proper settlement on the rule of law which is older than our Republic. * * * The propositions contained in the bill which we here report were embraced in a House bill in the last Congress (*i. e.*, the Congress extending from March 4, 1895, to March 4, 1897) and favorably reported from this committee. In that report the committee states that the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States, under the rule of damages prescribed by the Supreme Court in *U. S. vs. Behan*" (Rec., 208-9).

It appears that between 1895 and 1897 a report like that from which these extracts are made and bill like that reported by this committee had been submitted. On June 2, 1900, Mr. Mason, from the Senate Committee on Claims (56th Congress), made a report from the Senate Committee on Claims, which seems to be word for word like the one in the 55th Congress, in support of a bill also the same (*id.*, 209). Both of these reports were made prior to the contract with McGowan, which bears date August 4, 1900. After this date, viz., on May 17, 1902 (the 57th Congress), Mr. Graff submitted to the House a report very nearly, if not quite, identical with that submitted by him in January, 1898 (*id.*, 190). At the end of this report is appended a list of authorities (*id.*, 195), which Mr. Brookshire testifies was prepared by himself and by the committee added to the report. This addition caused no alteration in the prior part of the report, which, as stated in the first sentence thereof, is a literal copy of "Senate Report No. 351, 57th Congress" (*id.*, 190), submitted to the Senate on February 5, 1902 (*id.*, 200), and this last being the verbatim copy of the report to the 56th Congress also by Mr. Mason (*id.*). The report of the House Committee of May 17, 1902 (which down to a list of reported cases prepared, the complainant Brookshire testified by himself), is the transcript of the report

of the Senate of February 5, 1902, was offered in evidence in behalf of complainants. This collection of reported cases is the only contribution presented in writing of either complainant to the deliberations of the Committees of the two Houses. The record contains no offer of proof that either complainant wrote a word of the report of the Senate Committee, adopted without alteration by the House Committee, and no suggestion that either had any part or even knew of the earlier reports submitted to Congress prior to the employment of either complainant, for the ice claim before Congress in 1902-3, by J. W. Parish. The complainant Brookshire says: The Committee wished to know (in 1902-3) whether Mr. Parish had possessed himself of the 30,000 tons of ice, was prepared to deliver the same, and whether the rule of damages laid down in the Behan case should be substituted for that laid down in the Parish case, and that the purpose of the authorities he submitted, was to satisfy the committee, "*if possible*," that their inquiries were properly answered. But long before all these doubts had been solved. If the committee had forgotten the solution, all that was needed was to hand the chairman in 1902, the report which the same man had made in 1898. The cause for anxiety to satisfy the committee, "*if possible*," is not apparent.

On February 17, 1903, was approved the act to refer the Parish claim "to the Secretary of the Treasury for examination and payment of any balance found due" (*id.*). The auditor for the War Department found a balance due Parish of \$181,358.95 (*id.*). The Comptroller of the Treasury, however, advised that nothing was due. The Solicitor of the Treasury gave the same advice. On the 26th of January, pursuant to the Comptroller's revision, "said auditor canceled the certificate thereto made by him, and certified that *there was nothing due to said Parish on account of said claim.*" Thereafter the Secretary of the Treasury on the 31st of May, 1904, "did determine and

ascertain and state that under the said rule and evidence *no balance is due to said Parish on account of said claim.*" (Rec., 262.)

II

THE BILL TO ESTABLISH A LIEN

The bill in this cause was filed to establish a contractual lien. The illegality of the contracts under which this lien is claimed, and the features thereof which determine the illegality, will be discussed in another place. At this place it may be best to confine attention to what the contracts of complainants obliged them to do; and the reasons assigned in the bill, for failure to fulfill, or attempt to fulfill their obligation. By a contract of August 4, between Joseph W. Parish and Jonas W. McGowan, the latter engaged "to prosecute and *collect* the claim of the former against the United States for ice furnished the army." In consideration of professional services, "in the prosecution of the said claim," the latter was to receive a fee equal to 15 per cent of the recovery. McGowan "agrees to diligently prosecute said claim to the best of his professional ability to its final determination" (Rec., pp. 2 and 3). The 3rd of December, 1902, McGowan assigned one-third of his prospective fee to E. V. Brookshire. On January 20, 1903, Parish entered into an agreement with Brookshire which, as stated in the bill, begins: "For value received and for legal services heretofore rendered and to be rendered." When the contract was offered in evidence, it was seen that the true word was not "*heretofore*," but "*hereafter*," which was admitted to be in the handwriting of Brookshire (*id.*, 189). There is then recited the reference of the claim to the Secretary of the Treasury; the finding of the Auditor for the amount due Parish, and on the 31st of May, 1904, the final refusal of the Secretary to give effect to said award (*id.*, 5 and 7).

It is then averred (5th paragraph) that complainants advised with Parish in respect to steps to obtain payment of the claim, and had especially under advisement the expediency of filing, in the Supreme Court of the District of Columbia, a petition for mandamus to compel the Secretary to issue a draft to Parish for the amount of the award in his favor, "and were still considering, and still had under advisement the filing of a petition for the writ of mandamus as aforesaid, and were awaiting the return of the said Parish to the said District of Columbia from which he had been absent for some time until the time of his death, which occurred on the 26th day of December, 1904." It is charged in the same paragraph that both complainants, from time to time, advanced to Parish, "for the benefit of himself and his family, various sums of money, amounting in the aggregate to the sum of \$5,000, relying solely upon his promise to repay the sums so loaned out of what might be recovered in respect of said claim."

The 7th paragraph alleges; that "*well knowing that complainants were ready and willing to render their services for the further prosecution of said claim, the defendant, Emily E. Parish, executrix, as aforesaid, employed other counsel and attorneys without consulting with or advising complainants, for the further prosecution and collection of said claim.*"

In the 8th paragraph, it is alleged complainants "*are informed and believe, and on information and belief aver, that it is the expressly declared intention, will, and purpose of the said Emily E. Parish, her agents and attorneys to ignore and refuse to recognize the lien and claim of our complainants in and to the said fund of \$181,358.95, created and established in and by the contracts and agreements herein before mentioned and set forth; and by the valuable and indispensable service of your complainants, rendered in the prosecution of said claim.*" That "the estate of said Joseph W. Parish is, except for the

claim above mentioned insolvent." (That claim which had just been vindicated by this court of itself established solvency.) It is averred that none of the claims against the estate have been paid in whole or in part, and "Your compainants *are informed and believe, and on information and belief aver*, both Emily E. Parish and Grant Parish are insolvent, and if they receive into their hands the draft or the proceeds of the draft about to be issued by the Secretary of the Treasury, they will immediately take the same out of the jurisdiction of this court, for the purpose of defrauding complainants of their rightful *lien* and claim on said fund." The defendant's counsel find it difficult to understand how the counsel of complainants could obtain their own consent to state in their brief (p. 33): "No one of the allegations of fact thus set forth in the bill is the subject of any conflict or dispute in the testimony, except that there is a denial by the appellee that she intended to take the proceeds of the draft about to be issued in payment of the award, out of the jurisdiction of the court." The fact is diametrically the reverse. Not one of the averments under oath on which an injunction was sought was sustained by a word of proof. The complainants did not have the temerity to go on the stand to prove a single one of them. The "*information*" on which these averments under oath were made still awaits proof. The irresistible inference is that the complainants did not possess the information which they swore they did possess. In her answer the defendant, in response to said 8th paragraph, "denied, that it is the intention, will and purpose of said Emily E. Parish, her agents and attorneys to ignore and refuse to recognize any valid claim against the estate of her testator; denies that none of the claims filed and proved against the estate in the Probate Court have been paid in whole or in part, but on the contrary avers that all such have been paid and satisfied; and in

consequence her account passed and approved. She denies that she is insolvent, and denies that her brother is insolvent, and as to the last sentence of said paragraph she says that a sum more than sufficient to satisfy the alleged claims of these complainants is now in the custody of the Court to await the judicial determination of the validity of the claims alleged; but she again denies that complainants have a "rightful lien and claim to and on said fund" (*id.* 20.).

Complainants who were under contract to prosecute their client's claim "to its final termination," and who unquestionably did no such thing, evidently felt the need to justify their prolonged inertia. Therefore they aver that they "had *especially* under advisement and consideration the propriety and expediency of a petition for the writ of mandamus to compel, &c., "and were awaiting the return of the said Joseph W. Parish to the said District of Columbia from which he had been absent for sometime until the time of his death, which occurred in the city of Washington on the 26th day of December, 1904." Of this fact they offered no word of proof for the simple reason that it was not the fact. As shown by the proof Parish was not absent a single day between the decision of the Secretary and the day of his death. That is to say there was no truth in the justification which complainants averred under oath; and complainants made no attempt to prove it. This is the reason assigned in the 5th paragraph of the bill for the failure to file a petition for the writ of mandamus. The issue is clean and clear. From the averment of the bill but one conclusion can be drawn, viz., that complainants had failed to file a petition for the writ, because they "were awaiting the return of Joseph W. Parish to the District of Columbia." No dissatisfaction, no impatience with them, none by them is hinted. The need to assign a reason for their nonaction is thus acknowledged, and the only reason given is that pleaded in said paragraph. The

defendant was summoned to controvert this (and no other) justification for delay to prosecute a remedy prior to the death of J. W. Parish. This was a material averment upon which the Court was called upon to act. "Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises for otherwise *he will not be permitted to offer or require any evidence of such fact*," Story's Equity Pleadings, Sec. 28. The decree in the case must be *secundum allegata*. The defendant, as a witness, is asked, "Between the 31st of May, 1904, and the 26th of December of that year, was your father absent from the city of Washington?"

A. "He was not."

Q. "Was he continuously here during that entire period?"

A. "He was."

This is the uncontradicted testimony. The ground for the failure to file a petition in mandamus (and the ground on which issue was joined) is shown to have had no existence.

Morey is asked: "Do you know whether Mr. Parish was out of the city between May 31, 1904, and the time of his death to your knowledge?"

A. "Not to my own knowledge" (*id.*, 49).

Brookshire testifies: "Mr. Parish ceased to come to our office sometime after the middle of August" (*id.*, 72). As will be shown conclusively, there was excellent reason why Parish should have ceased to come to the office of either complainant after July 20.

"It is a general rule in equity pleadings, that every ultimate fact essential to the plaintiff's right to maintain the suit, and obtain the relief prayed for, must be stated positively, and with certainty, accuracy, and precision, in the bill; and relief will not be granted for matters not averred in the bill, *although they may be apparent from*

*other parts of the pleadings, and from the evidence in the cause. * * ** It (the bill) must show with certainty, accuracy, and precision that *all the plaintiffs have an actual existing right to, or interest in the thing demanded or the subject matter of the suit, and that they have a present right to institute the suit.*"

Bates on Federal Equity Procedure, Sec. 127.

The rule of equity does not differ, in substance, from the rule at common law, viz., that "whatever circumstances are necessary to constitute the cause of complaint" or the ground of defense must be stated in the pleadings. Chitty on Pleadings, p. 236, "*If the evidence differ from the statement the whole foundation of the action fails, because the action is entire in its nature, and must be proved as laid*" (*id.* 312.)

OBJECTIONS GOING TO THE COMPETENCY OF COMPLAINANTS' PROOF.

At the threshold of this discussion it is proper to advert to the incompetent character of the bulk of the proof offered by complainants as proceeding from parties who are here claiming against the decedent's estate. (Testimony) (*id.*, 25.) Objection was promptly made to this proof (*id.*, 28 and 47.)

In the course of the testimony of Morey it appeared that he was jointly interested with Brookshire in any recovery which might be had. Objection was then made to his competency to state "any transactions between Mr. Brookshire and Mr. Parish, or Mr. McGowan and Mr. Parish, or himself and Mr. Parish" (*id.*, 54; Dist. Code, sec. 1064). Similar objection was taken to Serven's report of conversations between himself and McGowan (Rec., p. 91), on the ground that to admit this were to allow complainants to make testimony for themselves. Sub-

ject to this preliminary objection and exception, the proof offered by complainants will be examined as if the same were competent.

III

The Pleadings in a cause are the judicial means investing a court with jurisdiction to hear and determine the controversy. What is nonapparent in the pleading is nonexistent for the trial. The intrusion at the trial of a wholly different justification for delay from that stated in the Bill; and the utter abandonment of that which was stated in the Bill, violated this principle of pleading and of justice.

In face of the emergency created by the answer, complainants sought to revise averment by proof at variance therewith. In place of absence from the city, "*Evasion*" while in the city was sought to be shown. Morey says: "I made appointments with Mr. Parish myself at our office, and he would not keep them. I would go to places where he was in the habit of going and leave messages for him, &c. We were endeavoring to have a conference with him for the purpose of taking definite action with reference to the further prosecution of the claim." (Rec., 34). Brookshire further testifies that in September he met Parish on a street car and told him that McGowan, Morey, and himself desired an interview with him (*id.* 72). At that date McGowan, to the knowledge of Parish, was in Dudley, Ontario (*id.*, 89).

On Sunday, October 9, 1904, Morey wrote Parish: "I called at your house today, but failed to find you. I am extremely anxious to see you, as *I have some very important news concerning your case.*" As to which he said in his testimony: "I have no comment to make in reference to this letter, as nothing occurs to my mind at the present time" (Rec., p. 114). This was not a message that counsel wished to see him, but that Morey (not

his counsel) wished to give him "very important news." If Parish exhibited no eagerness to hear the "important news," Morey had no cause to complain, and Morey cannot now recall anything that Parish would have gained by going.

The partner of McGowan gives a quiet negative to the doctrine of "evasion." Following the Secretary's decision, Serven says: "My recollection is that he (Parish) was in the office just about the same as he had been before that" (Rec., p. 87). "When did Mr. McGowan leave town that summer?" A. "I should say about the middle of July and from that on up to the 20th * * * That was the first summer he went to Dudley, Ontario" (*id.*, 88).

When the complainants averred first the absence of Parish from the city, then sought to prove in contradiction thereof, his evasiveness in the city, as the cause of their nonaction, they had in their hands the written evidence of their own acknowledgement, that neither absence of Parish from the city; nor his inattention to counsel when he was in the city, was the cause; but exclusively their confessed inability to think of anything which could be done for their client. The trouble was not that Parish "*evaded*" complainants, but that the remedy for the Parish case *evaded* them.

The defendant possessed the copy of a letter written by her father to McGowan, which enabled her counsel to call for the original. This was produced, offered in evidence by *the counsel of complainants*, and is as follows:

IV

Proof of Abandonment of Case by Complainants at Least as Early as July 20, 1904.

Prior to the 20th of July, 1904, McGowan verbally made the statement, set down in black and white, in the following letter (*id.*, 89-90).

"COMMITTEE ON CLAIMS,
"HOUSE OF REPRESENTATIVES, U. S.,
"WASHINGTON, D. C., Sept. 15, 1904.

"Hon. J. H. McGOWAN.

"MY DEAR SIR AND FRIEND: Your letter of 25th ult. received in due time and contents noted, which I answered best I could, but have no answer thus far come to hand and will repeat in substance I wrote, to wit: You will remember before you left Washington for your summer respite, you said substantially 'that you had done your best to get Auditor's report in my case paid by the Secretary of the Treasury and failed, etc.; *that you turned over to me the case to be managed in the future and do whatever I deemed best, etc.*' "

"Sometime next Congress I propose to organize a practicable method and resurrect the claim from its unfortunate condition and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore, I said that I would reimburse those who have advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit, 'that you would be glad and well satisfied to get the money advanced me' returned. My past record as to compensation, who had rendered me service, you have not surely forgotten, which was generous, and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm, who is doing business here and in New York.

"Yours hastily,

"J. W. PARISH,
"217 A St. S. E."

The explanation of the failure to further prosecute the claim is this admission of inability to discover a way to do so.

No answer having come to a previous letter, Parish puts down in black and white for a second time the words used by McGowan prior to July 20, 1904, and sends these to him. Restoring to the first person what

is herein the second, what McGowan said was: "I have done my best to get Auditor's report in your case paid by the Secretary and failed, &c., and turn over to you the case to be managed by you in the future and do whatever you deem best." Through the medium of no form of words could abandonment be made more explicit. Serven says: "*My best recollection is that those letters were delivered at our office, and that I opened them and forwarded them to Judge McGowan, and asked him what, if anything, he wanted done about them*" (Rec., p. 87). McGowan's partner asked what should be done about it. To Parish McGowan made no reply; to Serven gave no instructions. McGowan was told that by reason of this retirement of his counsel from his case Parish, of course, would make new arrangements. If McGowan had contradiction to give then was the time to give it. McGowan never did, to Parish, in anywise, repudiate the statements in this letter of September 15, 1904. They were uncontradicted then; they are incontrovertible now. The proof of abandonment is conclusive. There is more: You said to Brookshire, Parish writes (again in quotation marks), "that you would be glad and well satisfied to get the money advanced me returned." This also receives acquiescence, as does the natural sequence of the foregoing: "I must have unrestricted and unrestrained control." That the statement in this letter is the repetition of what had been said in a former letter, also received acquiescence. No word ever came from McGowan in denial of the words attributed to him.

The foregoing, it is submitted, tends to negative the conclusion stated by the trial Justice, "that the failure of the plaintiffs to proceed in some manner to the collection of the claim was due to the attitude taken toward them by the decedent during the last months of his life." The additional words, "and by his executrix after his death" (Rec., p. 222), will be considered hereafter.

"We think," the learned justice says, "that if they (complainants) had been fairly and frankly dealt with they would have gone on as their best judgment directed in the prosecution of the claim" (*id.*)

Did not Parish "frankly and fairly deal with" McGowan in submitting (for correction, if correction could be made) words of the latter by which the former necessarily was governed? Parish does not reproach McGowan, as well he might, for this abandonment of a cause at the most critical moment. There is no word in this letter of which complainants can complain; no word of resentment for such desertion at such a time. Nothing could be more kindly.

V

Counsel of complainants in their brief urge that the complete abandonment by McGowan, and complete turn over by him to Parish, could not affect Brookshire (Brief, p. 100.)

In his letter Parish was not engaged in making the record for a case (which he could not have anticipated), but merely engaged in the presentation of facts, which, if not true, could be easily corrected. So engaged, he added this: Furthermore, I said that I would reimburse those who have advanced money to promote the case thus far; and will do very much better for you *than you expressed yourself to Mr. Brookshire, to wit*: "That you would be glad and well satisfied to get the money advanced me returned. My past record as to compensation—who had rendered me service—you have not surely forgotten, which was generous." The glad satisfaction to receive "the money advanced" was the cheerful relinquishment of any money on any other account. The natural import of this is that Brookshire was present at the interview whereat the further conduct of the case was relinquished by the attorneys, and that Mc-

Gowan as spokesman turned to Brookshire to make this statement, and that the latter interposed no demurrer, but united with McGowan. Moreover, if Brookshire was ignorant of this letter, and did not join his own acquiescence to McGowan's, why did he not say so after this letter had been produced in evidence by the counsel of complainants? This letter was offered in evidence on March 23, 1910. Mr. Brookshire was on the stand as late as November 14, 1910—more than seven months afterwards.

According to the testimony of Morey, when the subject of the employment of Brookshire was broached, Parish stated, that such employment "would be subject to Mr. McGowan's approval" (*id.*, 25.).

When, subject to the approval of McGowan the contract of Parish with Brookshire "for legal services '*hereafter*' rendered," was subscribed by Parish, this addendum was added: "Said Brookshire agrees to render necessary and proper legal services in the prosecution of the above described claim," *in the future under the direction of said Joseph W. Parish.*—E. V. Brookshire (*id.*, 28). This then was a contract subject to the approval of McGowan; and expressly existing under the direction of Parish; virtually a contract at the will and sufferance of Parish, who was to prescribe, determine, and control. The dissolution of this contract did not necessarily call for the assent of Brookshire. But if, as is the fair implication, he was present and acquiesced, he assented. When, after the production in proof by the counsel of complainants, of the paper of September 15, he uttered no word of repudiation, disapproval or dissent, he again assented. Finally, McGowan and Brookshire were associate counsel. Notice to either was notice to both. Notice to the leading counsel pre-eminently so.

In view of this record what is left of the specious pretexts for failure to file a petition for mandamus? Here we have Parish standing face to face with McGowan to

receive from the latter final sentence upon his case. If there was cause to complain of Parish for absence from the city, or inattention to counsel while in the city, why was no reference thereto made by McGowan in the act of ending his connection with the Parish case. Some reference should have been made to that purposed petition for mandamus which was "awaiting the return of the said Joseph W. Parish to the District."

VI.

McGowan's Reception of the Attorney Who Was Expecting to Supersede Brookshire and Himself.

In pursuance of the purpose expressed in his letter of September 15, Parish carried his case to Thomas H. McKee. McKee says: "I asked McGowan what the status of the case was and who the attorneys were of record. As near as I remember, it was five years ago; he answered this: '*That he had prepared it and followed it up to the time it was rejected in the Treasury Department,*' but, he said, '*I don't care who collects it, I want my fee out of it*' (Rec., p. 120). The plain English of this is that since the rejection of the claim in the Department McGowan and his associate had not followed it, and were not proposing to do so. McKee is asked:

"Q. If in that conversation McGowan made any remark to you indicating what his purpose was as to the further prosecution of the case—whether he did or did not intend to prosecute it further?

"A. My recollection is that that matter did come up in the conversation. About the only thing that I remember distinctly about it was the statement on his part that *he did not care who continued the case.*

"Q. *He didn't say, then, that he did or did not intend to prosecute the case?*

"A. No" (*id.*, 178.)

McKee had said to Parish: "I wouldn't think of taking it without consulting Mr. McGowan" (*id.*, 179), and then went to McGowan to ascertain whether objection could be made to McKee's taking the case. McGowan said, in effect: "No objection can be made to your taking the case." It was a time for McGowan to be explicit or else forever afterward to hold his peace. Then was the time to say: "I and my associate are the attorneys in this case, ready, willing, and anxious to continue it to a final determination," and this was only a few days after the death of Parish (*id.*, 178), when it was peculiarly appropriate to acquaint the daughter that she had counsel under contract obligation to serve her interests, and who proposed to do so. One who felt under the obligation of contract to continue the litigation to the end should have so stated to McKee, who was evidently ready to accept McGowan's view on the subject, and not waited to say so to the daughter, through the medium of a bill in equity, after the case had been gained by others.

McKee, having stated that he called at the Parish house after the funeral, is asked by complainants' counsel to state what took place:

"A. It is pretty hard for me to recall. They were in mourning, of course, as it was immediately after his death, and the conversation for a long time that evening turned upon the life and character of Mr. Parish. It was a while before we got to the question, and my recollection is that *there was not much said about it*, only that I suggested to them, and we attempted to carry it out afterward, that we go to Judge Cole's office.
* * * There was not very much said. * * *
I had but *one* interview with the lady.

That was at her home, the evening, I think, after the funeral (*id.*, 179). Counsel for complainants state (Brief, p. 23) that in answer to the question: "Were the former

attorneys Mr. McGowan and Mr. Brookshire, mentioned?" he replied: "O, I think so. I think I talked freely about them." McKee did say this, but enlightened it by the following reply to Mr. Darlington: "Q. Do you recall that either on the occasion of this interview with Miss Parish and her brother, or some subsequent interview, Mr. McGowan's connection with the case was referred to?" "A. No. I do not think I could say, positively, that his name was mentioned. You see, I had but the one interview with the lady" (*id.*). McKee is asked: "Do you recall the name of any attorneys being mentioned in that interview?" "A. No. Not unless it was Judge Cole. I mentioned Judge Cole" (*id.*).

Miss Parish is asked by Mr. Darlington:

"Q. Didn't you send for McKee the day after the funeral?

"A. I did not send for him. Mr. McKee called on me not the day after, but several days after.

"Q. And you discussed the ice claim then with him?

"A. I haven't any recollection of it. Mr. McKee called to pay a visit of sympathy, and I haven't any recollection that we did.

"Q. Is your recollection vivid enough and strong enough to enable you to say you did not?

"A. I say I haven't any recollection of talking about the ice claim. I was too distressed to talk about business, and if he mentioned it to me I do not remember" (*id.*, 151).

Subsequently McKee testified: "Grant Parish came to me and demanded the papers, and I said, 'You can't get the papers unless your sister, who is the administrator, sends me a written request for them and she did. McKee realized that he had no right to deal with Grant as the agent of his sister. In the act of relinquishing all prosecution, "diligent" or other, McGowan, in law and logic, relinquished all claim to what was only due upon such "prosecution of said claim."

The dialogue with McKee brought home to McGowan, and his associate Brookshire, that Parish (acting, as he said he would, on the *abandonment* by counsel, so clearly communicated to him), had selected their successor. Beyond cavil, the conclusion to which Parish had arrived, then and there received the sanction of McGowan. In the most unequivocal manner, McGowan was notified, that Parish had already proceeded to act on the declaration, quoted for the second time, in the letter of September 15, 1904; and certainly McGowan said nothing to arrest the procedure. Nothing could be clearer than the estoppel, thereafter, to contradict the conclusion. The alteration in his conduct by Parish was caused, and naturally caused, by reliance upon the representations made to him by McGowan.

VII.

Complainants estopped to deny their abandonment of the Parish Case. If a party, by his silence, allows another to act upon a mistake of facts, even where there is mistake, he is thereby estopped from setting up those facts afterwards to the prejudice of the person who has been misled. His silence binds him upon the same principles, as if he had by express misrepresentation misled the other parties. Hence, were it the fact, that McGowan did not use the words he has never denied, his silence binds him to them.

"If whatever a man's real intention may be, he so conducts himself, that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it as true, the party making the representation would be equally precluded from contesting its truth."

Freeman v. Cooke, 2 W. H. & G., 663.

"As a general rule a party will be concluded from denying his own acts and admissions which were ex-

pressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter."

NELSON, J., in *Welland Canal Co., v. Hathaway*, 8 Wend., 483.

The principle "proceeds upon the ground that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. He is not permitted to deny a state which by his culpable silence or misrepresentations he has led another to believe existed, and who has accordingly acted upon that belief."

Morgan v. R. R. Co., 96 U. S., 720.

"What I induce my neighbor to believe is the truth as between us, if he has been misled by my asseveration," *Kirk v. Hamilton*, 102 U. S. 76. "He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others acted" (*id.*, 79.).

"Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." *Casey v. Galli*, 94 U. S., 680. To hold otherwise would be contrary to the plainest principles of reason and good faith, and involve a mockery of justice" (*id.*).

"The doctrine of Estoppels *in pais*, or by the act of the party, is founded in natural "justice," and is a principle of good morals as well as law" * * * No one is permitted to keep silent when he should speak, and thereby mislead another to his injury."

Gregg v. Von Phul, 1 Wall., 281.

"The equitable doctrine of acquiescence applies in full force in this case. It has been well defined as quiescence under such circumstances, that assent may be reasonably inferred from it. *Assent thus given is as irrevocable as if expressly stated in words.* * * * Assent is a necessary inference from acquiescence, and *estoppel was the necessary consequence of assent.*"

Lowndes v. Wickes, et al., 69 Conn., 30-31.

VIII.

The letter of McGowan, Morey, and Brookshire of November 19, 1904, to J. W. Parish, was a letter to add insult to injury.

McGowan had returned to Washington just before October 1, 1904. The last communication between attorney and client was the client's letter of September 15, 1901, which had remained unanswered. It was McGowan who was in default. Since his return he had written no word, nor had anybody for him, to say that he wished to see Parish for any reason. A letter from Morey had stated that Morey was anxious to see him for the purpose of giving "some very important news," but said nothing about McGowan. The last letter from Parish to McGowan, that of September 15, was as frank and friendly as McGowan could desire, and more so than he had a right to expect. There was no reason why Parish should further visit the offices of those who had disclaimed all further responsibility for him or for his case. McGowan had good cause to be content. He had been suffered to relieve himself of all further responsibility for a case he had contracted to prosecute to a final determination. Now, however, the quietude of Parish would seem to have excited a suspicion that most unexpectedly he had found a way. Without any disavowal of the words quoted in the letter of September 15 complainants evidently deemed

it judicious to see Parish again. The first move was to allure him by the prospect of "very important news." This not having the desired effect, a more imperious mis-sive was concerted. Morey is asked:

"Q. Did you ever write to Mr. Parish after Secretary Shaw's decision, on the subject of that decision, and on the future course to be pursued?

"A. I may have done so; but if I did, I do not recall it now.

"Q. Do you know of your own knowledge, not from hearsay, of either Mr. McGowan or Mr. Brookshire's doing so?

"A. Nothing further than that letter of November 19.

"Q. That was between the time of the adverse decision and the time of Mr. Parish's death, which was the 26th of December, 1904. You have stated now everything, as far as you can remember, that was said or done by you or your associate counsel in this matter with reference to any further action that was taken in the case?

"A. As far as I recall I have stated what I know" (Rec., p. 49).

Here, then, follows the one letter from either of complainants between the Secretary's decision and the death of Parish relating to the course to be pursued. McGowan's words of abandonment not having been written in a letter by him, but quoted from him in the letter of Parish:

The letter addressed to Parish, at his residence in this city, is singular, as coming from complainants, who to excuse their own dereliction, swore, in their bill, to the absence of Parish, after the Secretary's decision to the day of his death.

"NOVEMBER 19, 1904.

"MR. J. W. PARISH,

"217 A St. S. E., City.

"DEAR SIR: We have done what we could to secure an interview with you concerning the ice claim. You have deliberately advoided us. The time has come when the

matter should have attention. If we do not see you on or before Wednesday next, *we shall proceed as we deem best under the ample authority which we have.*

"Yours truly,

"J. H. MCGOWAN.

"E. P. MOREY.

"E. V. BROOKSHIRE."

The letter must have been expected to inflame and could have had no other result.

If McGowan felt a desire to see Parish he did not feel it strong enough to drop a line to him to that effect, nor had he once called at the house. If the two had not met, Parish had no more avoided McGowan than McGowan had avoided Parish. As already stated in respect to communication, it was McGowan who was in default. The words spoken by McGowan and twice repeated to him by Parish rendered further interview needless. The letter states: "The time has come when the matter should have attention." That time had come several months earlier, but some four months prior to this letter of November 19 had been expressed the conclusion of counsel that further attention would be fruitless. The letter concludes: "If we do not see you on or before Wednesday next, we shall proceed as we deem best *under the ample authority we have.*" Why, then, after "*Wednesday next*" did they not proceed, and as they did not need the interview for "authority," already "ample," to proceed, why did they write this gratuitously offensive letter? There is no sign that *what "we deem best"* was ascertained at any time prior to the decision in *Parish vs. MacVeagh*, 214 U. S., 124, decided May 17, 1909.

In this letter of November 19 there is no word in repudiation of the words attributed by Parish to McGowan in the letter of September 15, 1904; no disclaimer of them in whole or in part. *These words remained then, remain now, the uncontradicted words of abandonment.*

Nothing had happened to justify this letter. While McGowan was in Canada, letters entirely amiable had passed from Parish to him and from him to Parish (Rec., p. 89). What could have been the motive for this deliberate and coarse affront? The nearest approach to explanation is found in the brief which has just been filed by the counsel of appellants (Brief for appellants, pp. 97-8), wherein is stated: "Certainly the right of the attorneys, sought to be asserted in this suit, were not lost as against either Mr. Parish or his estate by *their failure to attempt to proceed further, after receipt of his reply to their foregoing letter of November 19.*" Here then is discovered a third ground of justification for the failure of complainants to take action, bearing date November 22, 1904 (Rec., 35), the date of the reply of Parish—a justification not hinted in the bill. They did not know when they filed their own opprobrious sheet, that the executrix had in her hands the copy of her father's letter, showing the abandonment of him and his cause, four months earlier. When McGowan sent the letter, he perfectly well knew he had in his files a communication showing that letter to be an unjustifiable impertinence and outrage. Parish replied in kind (*id.*, 35). Naturally, it incensed him to be threatened with some dire consequence, if he did not instantly obey the beck and call of them, who had dissolved all business relations with him. As there is nothing else in the record which smacks of asperity on the part of Parish, it must have been this reply of November 22, 1904 (not quite five weeks before the death of Parish), to which the trial justice refers as "the attitude taken toward them (the complainants) by the decedent during the last months of his life." But this letter could not possibly have caused the *abandonment* which had been put in writing more than two months earlier; put in words more than four months earlier, and proved by the paper produced from McGowan's files.

IX.

Complainants should not be heard to aver as they do in paragraph 7; that "well knowing that complainants were ready and willing to render their services for the further prosecution of said claim the defendant Emily E. Parish, Executrix, as aforesaid employed other counsel, &c." When, undoubtedly, complainants were "well knowing" of the letter of her father in the files of McGowan, explicitly stating their unreadiness and unwillingness to render services for the further prosecution of said claim." As according to the averment of the bill the reason of complainants for not filing a petition for mandamus after the death of J. W. Parish was the adverse attitude of his daughter, what was her attitude to them, and their attitude to her?

The executrix says in her answer that "from May 31, 1904, when payment was refused by the Secretary of the Treasury, to the 2d of May, 1906, when her mandamus suit was filed, the said complainants did not, nor did either of them, ever impart to this defendant their readiness or willingness to institute a mandamus suit or any other suit for the enforcement of her right." *Of this there is no contradiction.* In her testimony she was asked:

"Q. After your qualification as executrix of the will of your father, did you at any time receive any communication from either of these gentlemen—either Mr. McGowan or Mr. Brookshire?

"A. *I never did.*

"Q. Did either of these gentlemen, to your knowledge, ever call to see you—either Mr. Brookshire or Mr. McGowan?

"A. No, sir."

On cross-examination the defendant stated that she did not remember to have seen McGowan after October, 1903 (Rec., p. 133).

"Q. Did you ever receive from them, in any form, any information or statement as to their employment by your father for the prosecution of this claim?

"A. I never did.

"Q. *Did either of these gentlemen, after your qualification as executrix, either directly or indirectly and in any form offer to continue the prosecution of this claim against the United States?*

"A. *They did not.*"

The foregoing is wholly uncontradicted.

"Q. Have you at any time since your father's death been insolvent and unable to pay your debts?

"A. No, sir; I have not.

"Q. Have you ever intended at any time, if you should receive the amount that was due from the United States on account of this claim, to take it outside of the jurisdiction of this District?

"A. No, sir" (*id.*, 117).

The defendant is asked:

"Q. When did you first learn of a contract between your father and Mr. J. H. McGowan, dated the 4th of August, 1900?

"A. My first hearing of it was when this bill was filed.

"Q. I ask you the same thing as to the contract between your father and Mr. Brookshire, the 20th of January, 1903?

"A. I first heard of that contract at that time" (*id.*, 116).

This also remains wholly uncontradicted.

"Q. State if you had ever heard of any contract between your father and either of these two gentlemen as to their employment in the prosecution of this claim prior to the filing of this bill?

"A. No, sir; I never heard of any contract" (*id.*, 116).

"Q. Did you know during your father's lifetime that these gentlemen were engaged in the prosecution of his claim against the Government in this ice matter?

"A. Yes, sir; I know they were his attorneys" (*id.*).

On an examination-in-chief, covering not quite three pages, the defendant was subjected to a cross-examination covering forty-four pages. But not in this stringent cross-examination nor by the testimony of others are her statements discredited.

It seems unnecessary to consider conversation of Morey with Parish in defendant's presence in the summer of 1903 at Harper's Ferry. The case was then in the Treasury Department. Morey says: "The case was discussed while we were out driving." The carriage contained Morey, his wife, J. W. Parish, and Miss Parish. Morey continues (*id.*, 5): "We discussed the scenery and the goats on the mountain side and the battle fields." This was not enough to disclose a contract to prosecute the claim beyond the Treasury Department to a final determination. It would not be enough, even if thereafter the contract had not been abandoned.

X.

Complainants attempt to prove a constructive notice of that of which no actual notice was received nor directly sought to be given.

No reply has been made, none attempted to be made, to the effect of McGowan's language of abandonment. No explanation has been given, none attempted to be given, as to the failure of complainants to utter one word, oral or written, on any subject, to the defendant from the day of her father's death to the filing of this suit. It is a fair conclusion that they did not so much as

attend her father's funeral. Instead of the direct approach, which would have been so simple (the United States mail being the safe conduit therefor), complainants offer in evidence sundry indirect approaches, which they seem to consider should operate as constructive notice of their pretensions.

In respect to what took place after the death of J. W. Parish, Morey is asked: "Did you have any interviews with her (i. e., the defendant)?" "A. No." (*id.*, 36). But he says the following occurred: "Shortly after the death of Mr. Parish I met Mr. R. Golden Donaldson, of the firm of Cole & Donaldson, on the street, and *he* informed *me* that his firm had been retained by *Miss Parish*, as *executrix*, and stated that *he* would like to have a conference between McGowan, Mr. Brookshire, and myself *looking to our location in the case*. *He suggested that we write a letter to his firm asking for an appointment, and stated that an appointment would be arranged, when we would have a conference, and arrange, for ourselves in the case in connection with its further prosecution*. At his suggestion, a letter was written and signed by McGowan, Mr. Brookshire, and myself and sent to Messrs. Cole & Donaldson. *We received no reply to that letter*. Mr. Cole shortly after that became ill and died. * * * The only thing we sent to Messrs. Cole & Donaldson was our letter asking for a conference. That was after Mr. Parish's death *and at the suggestion of Mr. Donaldson*" (*id.*, 36). "Even after the death of Mr. Parish a letter was addressed to Messrs. Cole & Donaldson, who were her attorneys of record, *offering our services*" (*id.*, 45). "Q. *Did Mr. Donaldson state to you directly or indirectly that the firm of Cole & Donaldson ever had been employed in this ice claim?*" "A. Yes, sir." Q. *He did?*" A. Yes, sir" (*id.*, 48). Soon after the death of Parish, Brookshire says: "Mr. Morey stated that he had met Mr. Golden Donaldson on the street, and he stated that the firm of

Cole & Donaldson would entertain a letter from us, with a view of having a meeting *for the purpose of arranging for us in the case*" (*id.*, 73). Serven says: "Mr. Morey came into the office one day and said that either Judge Cole or Mr. Donaldson, of Cole & Donaldson, *had stopped him on the street*. I think he said it was on the street, and told him that *the executrix* or Grant Parish had been to see them about taking up this case, and that *it had developed that Judge McGowan, Mr. Brookshire, and Mr. Morey were in the case*, and he wanted to talk things over about it" (*id.* 93).

As is shown by the testimony to be hereafter cited, the firm of Cole & Donaldson had never been retained by Miss Parish for anything. Their only appearance in relation to the estate of Parish was in the Probate Court at the instance of Mr. Jesse E. Potbury to ask for the probate of the will of J. W. Parish. Still less could they have been at that time retained by "Miss Parish, *executrix*," since her letters were not granted until after the death of Judge Cole, on March 17, 1905. Still less could Mr. Donaldson have stated that his firm had been employed in the ice claim, for the simple reason that his firm never was employed in respect to the ice claim. It is not explained how from anything in the Probate Court it could possibly have "*developed that Judge McGowan, Mr. Brookshire, and Mr. Morey were in the case*," and especially how it could have been manifested or "developed" that Morey (who had no contract of any kind with Parish) was "*in the case*"—the ice case, necessarily—so as to cause Mr. Donaldson, in his sense of the pressing importance arising from this "development," to stop Morey on the street to arrange for the relation of others to the case.

In view of the statement that it was "at the suggestion of Mr. Donaldson" that a letter was to be written by complainants, coupled with the assurance that upon receipt of it a conference would be arranged, whereat

complainants could "arrange for themselves in the case in connection with its further prosecution"; that it was not complainants who sought to meet Mr. Donaldson, but Mr. Donaldson who expressed this eagerness to meet complainants, the letter which follows is a *non sequitur* from the reported interview and dialogue:

"JANUARY 31, 1910.

"MESSRS. COLE & DONALDSON and JESSE E. POTBURY,

"Attorneys-at-law, Washington, D. C.

"GENTLEMEN: Having learned *from the court record* (not from conversation with Mr. Donaldson on the street or elsewhere) that you have filed a will of Joseph W. Parish, and have made application for the probate of the same, and asked for the appointment of Miss Emily Parish, executrix thereunder, we would respectfully ask, owing to the fact that we have also placed a will on file and hold contracts with and powers of attorney from Mr. Parish for the collection of his ice claim, that we may have a conference with you touching matters affecting said estate. If agreeable let the time and place suit your convenience.

"We remain, gentlemen,

"Faithfully yours,

"J. H. MCGOWAN.

"E. P. MOREY.

"E. V. BROOKSHIRE."

(*Id.*, 99.)

No reference is made to the fact that the letter is written "at the suggestion of Mr. Donaldson"; none to the fact that the proposition for a conference "looking to our location in the cause" was Mr. Donaldson's proposition. The information which prompted the letter is stated to have been derived from "the court records" and from no other source. Mr. Morey says: "*We received no reply to that letter.* Mr. Cole shortly after that became ill and died" (*id.*, 36). The letter was written

on January 31, 1905. Judge Cole died on March 17, 1905, after a very brief illness. In six weeks there was sufficient time for a reply by Cole or Donaldson to a letter which had been so particularly requested by a member of the firm. Messrs. Cole & Donaldson had not been employed to prosecute the ice claim. Appearance in the Probate Court of itself no more imported such further employment for them than it did for Potbury. But when complainants saw the signatures to the petition for probate they reasoned that this contemplated an employment for something more difficult. Morey calls the letter one "*offering their services*" (*id.*, 45). An *offer* of services is always an offer which may be declined. There is no intimation that anything in relation to the subject-matter of the letter had ever taken place between the writers and the addressees.

Mr. Donaldson, called by complainants, and asked about the conversation with Morey, answered: "I am sorry to say that I do not recall the conversation to which Mr. Morey refers." Shown the letter of January 31, and asked if that refreshes his recollection. "A. This does not refresh my recollection of having received this letter. * * * I cannot recall having received this letter. * * * No definite arrangements had been entered into with either Mr. Potbury or any of the Parish family in relation to the prosecution of the ice claim; but we had gone so far as to present a petition in the Probate Court for the probate of Mr. Parish's will" (*id.*, 97). "I simply have no recollection on the subject—*i. e.*, of the conversation with Morey (*id.*, 99). "Q. Did you know Mr. McGowan?" "A. I don't think I did, sir" (*id.*, 98). "Q. Did you know Mr. McGowan and Mr. Brookshire were ever connected with the prosecution of the ice claim of Mr. J. W. Parish?" "A. Well, I really do not know what connection Mr. McGowan and Mr. Brookshire had in the matter. I really do not know. *I do not know what if any connection they had*" (*id.*, 99). "After the death

of Judge Cole, I suggested my entire willingness to permit the parties to have other counsel if they so desired, and as a result of that I think all the papers were turned over to Mr. Potbury. * * * Whatever papers we did receive came from Mr. Potbury" * * * (*id.*, 100). "After the death of Judge Cole, which occurred on the 17th of March, 1905, I turned everything we had in the office over to Mr. Jesse E. Potbury. My understanding was that he was counsel in the case. *I think it was he who first brought the matter to our attention*" (*id.*, 97). At this date, some time after March 17, 1905, certainly six weeks and more after the letter of January 31, Mr. Donaldson was unaware that any one save Potbury represented any interest of the Parish estate. *Complainants propose that the letter which failed to inform the party to whom it was written should be held to have constructively informed the defendant of their pretensions.* The letter of January 31, 1905, was designed, Morey says, to be one "offering our services." What need had complainants to offer services *which had already been retained?* Why did they not by letter call the attention of defendant to that fact?

XI.

Attempt to Affect Defendant with Knowledge of Contract by Testimony of Potbury and Brookshire.

Mr. Jesse E. Potbury entered his appearance as a solicitor for the defendant in this cause on the 24th of May, 1909 (*id.*, 115). An order having been given by the firm of Cole & Donaldson for the withdrawal of their appearance in the Probate Court (October 23, 1905—*id.*, 201), Mr. Potbury attended to the statement and settlement of the final account of Miss Parish as executrix. For these services he had originally provided as his own compensation—first for representing the estate, \$3,000.00; second, for representing the three beneficiaries, Grant

Parish, Emily E. Parish, and the Young Men's Christian Association in this estate and in all matters connected with the estate, and also to act as retainer fee in representing said executrix and Grant Parish and the Young Men's Christian Association in the suit of *Jonas H. McGowan et al. vs. Emily E. Parish et al.*, now pending in the Supreme Court of the District of Columbia, and in any other suit or suits which may be filed against said executrix or the legatees herein named the sum of \$3,000.00 (*id.*, 183). Miss Parish did not object to the charge made for services to the estate, but did object to what seemed to her a second charge for virtually the same thing, the consequent benefit to the beneficiaries under the will, and for services in the future which might not be rendered. An arrangement was made whereby the additional \$3,000.00 was relinquished, and Mr. Potbury ceased to represent Miss Parish in all pending suits (*id.*, 182).

When Mr. Donaldson withdrew from all professional relations with Miss Parish he turned over to Mr. Potbury (the only one, so far as he knew, having such relations) all the papers in his possession bearing on her business, and as *the one* having such relations Potbury received them. When Mr. Potbury withdrew from all relations with the executrix certain confidential papers in his possession relating to her business were seen by his former associates for the first time, when they were produced by him at the summons of defendant's adversaries.

Called to give evidence in support of the contention of complainants, Mr. Potbury produced the letter of McGowan, Morey, and Brookshire, bearing date January 31, 1905. "Q. Did you communicate the contents of that letter by any one?" "A. I did not." This he amends by saying: "I either showed the letter or communicated its contents to Mr. Grant Parish" (*id.*, 103). He further produced a letter of professional confidence,

written by Grant Parish to Judge Cole, a similar letter written by Grant Parish to himself.

Potbury says: "I stated to him (Grant Parish) that I did not see how we could get over that contract"—*i. e.*, the contract with McGowan (*id.*, 110). The words would seem to contemplate Potbury as included in "we," and further that his mind was troubled as to how to get over a contract he had never seen which anxiety, however, did not diminish his exertions to do so. With his own hand he drew up the contract for the performance of that duty by Mr. Conrad (*id.*, 108). He went to several offices to employ the lawyers in them "to get over it."

He states he saw Mr. Darlington with a view to his employment and he was too busy (*id.*, 108). He next went to Judge Cole's office. "Judge Cole came in and said he was too busy to take it up at that time, but would make a later engagement. With that I placed all the papers in the hands of Cole & Donaldson" (for them to get over it) (*id.*, 109).

In the present suit the appearance of counsel for defendant was entered by Potbury as follows:

"Equity. No. 28561.

Filed May 24, 1909.

"The clerk of said court will enter the appearance of Holmes Conrad and Jesse E. Potbury as solicitors for the defendant, Emily E. Parish.

"HOLMES CONRAD,

"JESSE E. POTBURY,

"Attorney for Defendant,

"EMILY E. PARISH, *Executrix*."

(*id.*, 121).

Mr. Potbury had a conversation with Mr. Brookshire in front of the Loan and Trust Building.

"By Mr. CONRAD:

"Q. Did he express any opinion to you as to whether the remedy that I had employed was the proper remedy or not?" "A. The exact language he used at that time I do not remember, nor can I give the exact words; but it was, as far as I recollect, that they were on the wrong track, and the matter should be presented to the Court of Claims, or something like that."

"By Mr. ROBINSON:

"I understand that you stated that Mr. Brookshire said the proceeding which had been taken was on the wrong track?" "A. Something like that" (*id.*, 112). In view of the solemn averment under oath by complainants this repudiation of the subject of "*special advisement*" could not have been expected. At this date the former counsel of Parish had not determined what should be done in the prosecution of the claim.

Mr. Potbury testifies that he "either showed the letter (of January 31, 1905, from McGowan, Brookshire, and Morey) or communicated its contents to Mr. Grant Parish" (*id.*, 103). Grant Parish in a letter of February 2, 1905, to Judge C. C. Cole vented his indignation. On February 7 Judge Cole acknowledged receipt of the letter of the 2d, and says: "I am very much engaged at present, and will be unable to see you and your sister for about a week, when I will fix a time. I note what you say about an interview with Messrs. McGowan and others. *We will enter into no arrangement with them without first consulting you.*" Is this the letter Judge Cole would have written had he understood that "McGowan and others" had a paramount right in the premises, or the letter he would have written, if that of January 31 had been supposed by him to have been written in response to the request of his firm? If Mr. Donaldson had impulsively held up Morey, as testified, *should not and*

would not Judge Cole have acknowledged responsibility therefor?

Mr. Conrad asked Potbury: "*Did you ever tell me at the time of that contract (the contract Potbury drew for the employment of Conrad) (id., 111) that Mr. McGowan, Mr. Brookshire, and Mr. Morey were counsel in this case?*" "A. I did not, Major, because Mr. Parish employed you himself." "Q. In all your conferences with me about this matter, in the early stages of it, did anything occur to convey to your mind the impression that I knew that Mr. McGowan, Mr. Brookshire, and Mr. Morey were counsel in this case?" "A. You did not so state to me; neither did I advise you of it" (*id.*). So, through this source, Miss Parish was not affected with knowledge of the contract.

Brookshire was asked by Mr. Conrad: "Did you ever, at any time, offer your services and association with Mr. Robinson and myself in this suit?" "A. Why, Mr. Conrad, I did not feel that I could offer myself in the case" (*id.*). If he had a paramount contract, which made it a violation of contract for any other to be in the case, he need not offer, but demand that only by consent of complainants should the services of others be accepted. He knew of Mr. Conrad's employment as early as the 10th of February, 1906. Why did he not speak of the contract then to the executrix, so as to save the labor and expense of another's preparation for the trial?

The purpose of Brookshire in calling on Mr. Conrad is thus stated by the former: "I came there believing that you would think that the balance found due by the Auditor for the War Department was an *asset* that we had aided in creating, and that you would at least treat me with courtesy and *perhaps* solicit our co-operation when you knew that fact, as Cole & Donaldson had, I am informed, on a previous date" (*id.*, 177). If by his language Brookshire meant to say that Cole & Donaldson on a previous date, by reason of anything communi-

cated to them, had solicited the co-operation of McGowan and Brookshire the statement had nothing to support it. The purpose of Brookshire's visit was not to assert a contract which would put Mr. Conrad out, but apparently to assert merits which would tend to put himself in. The language of Brookshire in this dialogue is the plainest recognition by him of the abandonment wrought for him no less than McGowan, by the letter of September 15, 1904, and the subsequent interview with McKee. Brookshire came to Mr. Conrad, not to arrest, but to participate in the latter's employment; not to dictate, but to receive leave to co-operate, and that leave, not a matter of right in himself, but a matter of grace from Conrad.

The letter of Grant Parish to Judge Cole (produced by Potbury) refers to the fact that Messrs. McGowan, &c., have requested an interview with you and your associates, "*who will represent us in the Probate Court.*" I fully know the nature of this conference before it will take place. My father dismissed these lawyers for gross incompetency, having failed through their incompetency in forcing the Government," &c. This is inaccurate. J. W. Parish did not dismiss "these lawyers," but "these lawyers" dismissed Parish, or dismissed themselves from Parish. He continues: "My father had no intention whatsoever to allow them to re-enter the case again." It is immaterial what the father's intention was. The complainants once out of the case, Parish and his representatives were under no obligation to permit them to return, even if they evinced a desire to do so. The letter concludes: "Messrs. McGowan, Morey, and Brookshire chased after my father, and finally threatened him." It is not correct that these complainants "chased after" the elder Parish. They did the reverse; they abandoned him. But it is true they "finally threatened him." This senseless threat, if it was uttered with any other purpose than

to enrage, is that which incensed the sire in his lifetime and the son after his death.

This letter of Grant Parish could not possibly have interfered with the offer of the services of the complainants, since they could not have known of it *until it was produced for their benefit after the filing of the present suit and the separation of Potbury therefrom*. The letter of November 24 by the elder Parish did not (in their own judgment) preclude the further offer of their services. They did indeed waive all right to do so, or to suggest a right to do so, on the employment of McKee. But when they supposed that Cole & Donaldson had been employed to prosecute the claim which had been abandoned by themselves they wrote the letter, which they now claim was expected to call attention (not of the defendant, but of Cole & Donaldson) to the propriety of their own employment; that is by Cole & Donaldson, as associates. Judge Cole died March 17, 1905.

Brookshire says, "perhaps a month or two months after that he called at the office of Grant Parish" (Rec., p. 73) to tell him "that Mr. McGowan, Mr. Brookshire, and myself" were anxious to go on with the case. It is true Grant Parish, also called by the complainants, says: "Brookshire never told me he was willing and ready or anxious to continue in this case." Assuming Brookshire's statement to be correct, this call was made something like a year after the adverse decision of the Secretary. In that time no step had been taken or suggested by McGowan or Brookshire.

The call was made a little less than five months after the death of J. W. Parish. In that time not only no syllable on the subject had been spoken to the defendant, but no approach had been made to any member of her family. On the authority of cases to be hereafter cited, even had there existed a contract, and even had defendant known of it, this delay of complainants to take any step

of any kind, and failure during this long period to communicate in any way with the defendant, of itself, was tantamount to abandonment, and of itself would have justified the employment of other counsel.

For the purpose of making the defendant responsible for what was said by complainants to Grant Parish and by him to them, it was necessary to maintain that Grant was the agent of defendant. Grant himself, called by complainants, says he was not (*id.*, 61). The defendant was asked: "Has your brother, Grant Parish, ever been authorized by you to act as your agent in this matter?" "A. No, sir; he never has." "Q. *Has he ever been empowered or authorized by you to represent you in any matter connected with the administration of your father's estate?*" "A. No, sir." "Q. *To what extent have you in that matter used the services of your brother?*" "A. Well, I have asked my brother to take messages and he has done so" (*id.*, 118). As has been shown, McKee had no doubt as to the true state of the case when he said to Grant, "You can't get them (the papers) unless your sister, who is the administrator, sends me a written request for them, telling me to deliver them to you" (*id.*, 180.)

XII.

Appellants estopped to set up the pretension, that they communicated with Grant Parish as the agent of appellee, or were governed by communications from him, on the hypothesis he was such agent.

The evidence introduced by complainants shows that in good conscience, they could not use Grant Parish as the agent of, or a responsible medium to communicate with, his sister. Serven, the partner of McGowan, testified, as witness for complainants: "Mr. Parish (*i. e.*, J. W. Parish) in my office, one day, said to me, that Grant had certain times in every month when he was not quite right in the

head; that he had either had a fall or a sunstroke, when he was a child, and that in certain phase of the moon his head was always affected, and he would do things that he ought not to be held responsible for. He referred to attempts which Grant had made with him and also to attempts of Grant made with the Judge to make the Judge angry in order to try to get him out of the case. Judge McGowan had told me the same thing—that Grant had tried in every way to get him out of the case" (Rec., p. 92).

It seems to have been conceived, in McGowan's office, that the way to get counsel out of a case (and more strangely for counsel to be retained in a case) is by exciting anger. They offered in evidence a letter of J. W. Parish to McGowan, dated September 29, 1903, in which the writer says: "I think until Grant is soundly 'side tracked' he will be liable to act as a lunatic, 'as he surely is'" (*id.*, 131). They also offered this of October 25, 1903 from J. W. Parish to McGowan in which is said: "Grant is in no sense in a fit state of mind to take part in what is and should be done. His warped mind and injudicious temper inspired by Satan, unfits him to do justice to anyone" (*id.*, 148). The production of these letters was deeply mortifying to the defendant as well as to her brother. By her, or on her own behalf, they would never have been offered. It is with regret, that counsel for appellee, feel it due to her cause, to point in the brief she will read, testimony so mortifying to her and to her brother. It is the proof forced upon appellee by complainants. They come before you asking you to accept their alleged offer of renewed service through Grant Parish (the fact thereof being controverted by Grant himself) as the sufficiently explicit tender of service to the sister.

The conduct of complainants is especially peculiar in this; that in choosing, as is avowed, as organ of communication, a brother shown by themselves to be hostile,

they ignored another brother shown by themselves to be friendly.

James Parish (by a typographical error printed in the record, Joseph H. Parish) died in Chicago January 10, 1908 (Rec., p. 185). Serven says: "I think when Judge McGowan was in Congress, Jim Parish had been a stenographer, he had done some work for him, and I think later had been employed in the Judge's office, and their relations were very friendly. Jim Parish, through correspondence, had kept fairly closely in touch with the progress of this case" (*id.*, 94). In the latter part of 1905 and first part of 1906, if McGowan desired to recover relations with the Parish claim why instead of sending Brookshire to Grant Parish, did he not turn to the former employe in his office, and open communications with the representative of the estate through a friendly, instead of through a hostile medium?

The letter of J. W. Parish, in addition to the testimony of Serven, show that the complainants could not, in good faith, deal with Grant Parish as his sister's agent. By the certain channel of the United States mail, they could, at any moment, have written to the executrix, had the facts justified: "We have an existing and valid contract with your father, under which it is our duty to prosecute his claim to a final determination, and we are ready to do so." The unequivocal abandonment of the contract was an embarrassment to saying this in black and white; especially in the uncertainty, as to whether the executrix did or did not know of her father's letter of September 15, and, in consequence of their own acquiescence in the correctness of the statements therein.

XIII.

No service rendered by McGowan in respect to the ice claim (still less by Brookshire, subsequently employed) preceded the date of McGowan's contract, viz., August 4, 1900.

It is stated in the bill "that for a long time prior to said last-mentioned date (August 4, 1900) the said Jonas H. McGowan had rendered professional services as a lawyer to the said Joseph W. Parish in the preparation and prosecution of said claim" (*i. e.*, the ice claim). Of this there is no proof. Mr. Morey, in answer to the question what personal knowledge he had of McGowan's connection with the case before the act was passed, answered: "Only what Mr. Parish told me and what Mr. McGowan told me." (This, of course, was subject to the objection that one who was claimant against the estate of Parish could not testify as to conversation with the decedent, and to the further objection that the claimants against the estate could not make testimony for themselves by testifying to conversations with themselves). Serven says the act of Feb. 17, '03, was drafted by McGowan, as at that date Serven was in Government employ, this at best was hearsay. Quite likely McGowan copied the act, which as shown, had been drafted in repeated Congresses before the contract with McGowan. The witness proceeded: "Why, Mr. Parish told me himself that Mr. McGowan had been his attorney for a number of years; ten or fifteen" (*id.*, 43). The service really rendered by McGowan will be considered later. There is evidence that McGowan in 1889 drew a sum of money from the Treasury under a power of attorney from Parish, but a sum of money having no relation to this ice claim. The recital in the bill: "The said Joseph W. Parish being desirous of securing the services of Elijah V. Brookshire (*i. e.*, at any time prior to the Brookshire contract with Parish) is not proof, but only an unproven averment." In the opinion of the trial Justice it is stated: "The words 'for value received' in Brookshire's contract must refer, we think, to such prior services, even though we hold ourselves to the exact wording of the contract, which very likely was intended to read '*heretofore*,' where it does read '*hereafter*'" (*id.*, 236). The contract of Parish

with Brookshire, dated January 3, 1903, states the consideration to be "for legal services *hereafter rendered and to be rendered* by E. V. Brookshire" (Rec., p. 27). To this Brookshire adds:

"Said Brookshire agrees to render necessary and proper legal services in the prosecution of the above-described claim *in the future* under the direction of said Joseph W. Parish.

"E. V. BROOKSHIRE."

(*Id.*, 28.)

The word "hereafter" in the contract is admitted to be in the handwriting of Brookshire (Rec., p. 189). On cross-examination Brookshire is asked: "*All of those services as you have detailed them rendered by you before committees of Congress and the executive departments of the Government were all rendered under and in pursuance of your contract of employment with Mr. J. W. Parish, were they not?*" "A. *And my contract of employment with McGowan. I had two contracts.*" "Q. You derived all of your authority to appear and act in this matter from those contracts, did you not?" "A. I think so" (*id.*, 76).

The counsel for appellee are unable to agree with the trial justice, that the words "for value received" must refer to prior services (Rec., 236); still less with counsel for appellants, that such service "the testimony shows without dispute had already been rendered by McGowan or Brookshire" (Brief, p. 11).

"The words 'value received' used in an instrument do not necessarily import a consideration to pay in money. A promise *to pay in the future* may have been the consideration." *Osgood v. Bringolf*, 32 Iowa, 265. "Not only does the phrase not necessarily import a consideration in money, but it does not conclusively import a consideration of any kind" (*id.*, 270). Hence in actions on bills or notes charged to be usurious, it has been held: "The

fact that the bill contains the words 'value received' does not make the mere offering of such a bill for sale or discount, a representation by S. or L. that it was actually accepted for value, received by the acceptor, which will preclude, or estop, either of them from proving the contrary."

Clark v. Loomis 12 N. Y. Superior Court (5 Duer.)
476.

If the unequivocal disclaimer did not exist, the words "for value received," would not of themselves imply value prior to the contract. In no case could the implication be so strong as to overcome the explicit statement to the contrary.

After setting out the agreements with McGowan and Brookshire, the 4th paragraph of the bill alleges: "Pursuant to the employment *above mentioned* and the agreements "hereinbefore set forth" save those of August 4, *operation and together* diligently prosecuted said claim." There was no "*employment above mentioned*"; no agreements "hereinbefore set forth" save those of August 4, 1900, January 20, 1903, and intermediately the assignment of December 3, 1902. There is no evidence of any service rendered by McGowan in respect to the ice claim prior to August 4, 1900. In the case of *Parish vs. U. S.*, 100 U. S., 500 (at October term, 1879), the report shows the attorneys for Parish in that court to have been John B. Sanborn and Ralph P. Lowe. The same attorneys were counsel in the Court of Claims, from whose judgment the appeal was taken. The irresistible presumption is that these attorneys were in place to look after the payments resulting from the litigation of which they had charge. The only payments prior to that ordered in *Parish vs. MacVeagh*, 214 U. S., 124, were made by the Court of Claims in 1880, and under the act of February 20, 1886.

XIV.

There is however, evidence of an interest in the Parish family manifested by McGowan as early as 1889, having no connection whatever with the ice claim; the papers relating to which might very well have been in McGowan's office, and in respect to which Parish, quite naturally, might have referred to McGowan as his counsel.

For the apparent purpose of showing the dependence of defendant on McGowan, complainants' counsel questioned her concerning an old suit in which McGowan and herself were involved (*id.*, 117). Some impatience having been manifested that after the lapse of more than twenty years the defendant could not recall the details with precision, at a subsequent meeting, she exhibited the record in *McDaniel et al. vs. J. W. Parish et al. and McGowan*, No. 257, December term, 1893, in this court. The bill charged that the premises now occupied by defendant had been bought with money of her father and the title taken in McGowan's name to hinder the creditors of Parish. McGowan answering that the purchase had been made for Miss Parish by an amended petition, she was made defendant (*id.*, 175). An amended petition was filed making Emily E. Parish a party defendant, and averring "That the defendant, Emily E. Parish, knew nothing touching the entire purchase of the property, except what was told her by the defendants McGowan and Parish" (*id.*, 175). The amended petition stated "that on the 18th of March, 1889, the United States issued its draft No. 27336 for \$18,000, payable to the order of J. W. Parish & Co., which was endorsed by said Parish to the defendant McGowan." McGowan testified that he "drew the money upon that draft." "I had," he stated, "two matters, each aggregating about \$18,000. One was for some barges that were broken up during the war on the Mississippi river. That was a Treasury matter, and

after it was allowed it went to Congress and an appropriation was made, which I had paid through the Treasury Department very much as I did the other matter, which was an appropriation for an ice contract." To whatever ice contract this may have related, it was not the one with which this suit is concerned. No appropriation therefor in the sum of "about \$18,000" was ever made by Congress; none therefore was made in respect to any claim which had been allowed before Congress was called upon to act, and no draft in payment thereof was issued at any time in 1889 or at any time after 1886. In seeking to find out what was paid over to Parish in order to find what, as plaintiffs contended, was subject to the claims of creditors, McGowan was asked: "Q. Will you please tell me how much you took out for yourself?" "A. I think, in justice to my client, I should decline to answer that question." "Q. *Do you decline to answer that question because you do not want to state the amount of money you paid to Mr. Parish, or because your fee was extraordinarily large?*" "A. *Because it is a matter between client and attorney, which should not be divulged*" (*id.*, 1721). Between this transaction in 1889 and August, 1900, there is no evidence of any service rendered by McGowan to Parish. Still less is there evidence of any service rendered by Brookshire at an earlier date than August, 1900. Assuming the more legal ground for objecting to answer the questions above recited, to wit, the size of the fee, it is a fair conclusion that McGowan had been superabundantly compensated for all that his talents deserved (*id.*, 175-6).

The defendant offered in evidence (Rec., pp. 158 *et seq.*) a deed of September 16, 1896, recorded the same day, from Emily E. Parish to Grant Parish. Another deed, made and recorded the same day, from Grant Parish to Emily E. Parish, wherein the grantor promises and agrees "to furnish his said sister at all suitable times with money and means to make such purchases of food,

materials, raiment, fuel, and all things proper and necessary to keep up and maintain her own personal wants and needs," and a third deed, of March 11, 1898, recorded the same day, from Grant Parish to Emily Parish of the premises aforesaid. This record proof disposes of the unproven charges as to the necessity of a resort to McGowan for the necessities of life. On August 6, 1896, McGowan wrote to Grant Parish acknowledging check for \$10.00, in payment of services to Miss Parish, and saying: "It is a great gratification to me to think that she has a nice little home now free of encumbrance, I believe, by reason of your assistance" (*id.*, 160). Here is proof placed on record a decade before this suit was imagined, showing that Miss Parish had no need to be the mendicant of McGowan, and was not.

XV.

Citations of proof by complainants, not found in the Record, but contradicted by the Record.

In the Brief in behalf of complainants, it is asserted, as a fact, not "the subject of any conflict or dispute": "That the complainants did make advances to supply the necessities of life to her testator (*i. e.*, the testator of Miss Parish), and herself.

The proof is quite the reverse. Miss Parish was asked: "Have you any means of refreshing your memory as to the time, when you first received money as a friendly assistance, or for your aid from Mr. McGowan?" "A. I don't remember any until after we went to Ocean Grove in June, 1903." "Q. And what was the amount?" "A. I think it was \$25 a week." "Q. And how long did that continue?" "A. Until we came back in the city, the last of October." "Q. For what purpose was it advanced?" "A. Mr. McGowan made the arrangement with my father." "Q. For what purpose was it used?" "A. For our expenses." "Q. For food and clothing?" "A. Not

for food and clothing. No; Mr. McGowan never bought any clothing for me." "Q. What was the money used for?" "A. As I said, for our expenses—our board" (*id.*, 129). "*Mr. McGowan never gave money for our household expenses*" (*id.*, 128)

Complainants proved a letter of September 29, 1903, from executrix, urging the importance of a speedy return to Washington, and complaining of the delay (*id.*, 132). "Q. What agreement justified you in writing this letter?" "A. We had been wanting to come home." "Q. What right had you, or what reason had you to complain to Mr. McGowan?" "A. Because it was through him that we were sent down to Ocean Grove." "Q. Why and under what circumstances did he send you down to Ocean Grove?" "A. Well that I don't know" (*id.*, 132). Counsel for Miss Parish interposed to claim, that in this investigation, not responsive to anything asked in direct examination, counsel for complainants made the witness their own. "Q. You saw him (Mr. McGowan) before going to Ocean Grove?" "A. Yes sir. I went to his office to ask him if it was necessary—we both objected to going—and he said he thought it was best" (*id.*, 134-5). These petty advances, which all told, could not have exceeded five hundred dollars (\$500), were made by McGowan to subserve his own purposes. They were made by McGowan to subserve his own purposes. They were not requested of McGowan by Parish, but imposed upon Parish by McGowan, and in reason and justice not the debt of Parish.

In the 5th paragraph of the bill it is averred: "For a long time prior to the death of the said Joseph W. Parish, he and his family had been in necessitous circumstances and in order to relieve their pressing *wants*, both of the complainants from time to time advanced to him *for the benefit of himself and family*, various sums of money, amounting in the aggregate to the sum of five thousand dollars, relying solely upon his promise to re-

pay the sums so loaned out of what might be recovered in respect of said claim." Not one word of this averment was attempted to be proved by the complainants who swore to it, and, as is shown by the foregoing, in effect, every word of it is denied in the testimony of the defendant.

Counsel of appellants in their brief (p. 25) refer to the sending of the Auditor's statement to Parish, care of Attorney J. H. McGowan, as "making denial impossible by the appellee, that at the time she instituted her mandamus proceeding, she knew that the award upon which her entire mandamus proceeding was based, had been secured while Mr. McGowan was her father's attorney." The imputation is that the appellee did make, or attempt to make such denial. The imputation is the exact reverse of the truth. The appellee here, the defendant then was asked: "Did you know during your father's lifetime, that these gentlemen (McGowan and Brookshire) were engaged in the prosecution of his claim against the Government on this ice matter?" "A. Yes, sir. I knew they were his attorneys" (*id.*, 116). What the appellee does deny; what her counsel sustain her in denying is, that after the letter of September 15, 1904, and acquiescence therein, McGowan and Brookshire could pretend to be the counsel of Parish or his estate.

The counsel for complainant state in their brief (p 105) the assertion of abandonment "rests, of course, upon the appellee who asserts it. The only evidence in its support is the *self-serving declaration* to that effect contained in the letter of Mr. Parish, of September 15, 1904" (Brief, 105). Certainly the counsel of the appellee have no quarrel with anything so sensible as the rule of common sense; that self-serving declarations, or declarations of a party in his own favor, are not admissible in his behalf. It has been said too often to need authority—No one can manufacture evidence for himself. Proof of conversations between parties on one side of a cause,

not communicated to the other are clearly inadmissible. *Graham v. Middleby*, 185 Mass., 353. It "violates an unbending rule of evidence, that a party to a suit cannot offer in evidence his own declarations." *Hagan v. Hendry*, 18 Md., 190. What then was the "self-serving declaration" of which counsel complain. It was a recital to McGowan of the language of the latter, in effect, abandoning the Parish case, and turning it over to Parish "to be managed in the future" by the latter; language which to the day of his death was never contradicted, or sought to be modified by McGowan. It comes before the court, not as the *self-serving statement* of Parish, but as the self-disserving statement of McGowan, as such an admission which it is not permissible to deny.

As an example of testimony not self-serving, the learned counsel gives the following: "He (McGowan) remarked in the hearing of the witness Serven, upon the suggestion of abandonment of the case by him; that after working on it for all these long years, any man who would abandon the case when it was so near the finish of it must be a fool (Brief, p. 99). Counsel for appellee respectfully submit, that the man must be a greater fool, who never made this speech, or any thing like it, to his own client. It is a speech never shown to have been made to anyone, until Serven took the stand, nearly six years after the death of Parish. It is not pretended that this was said in the presence of Parish. There was a slight attempt to insinuate that it was, but promptly abandoned (Rec., p. 91). It is respectfully submitted, that what McGowan is alleged to have said to his own partner in their own corner is emphatically "self-serving."

Of the interview of McKee with McGowan, the learned counsel stated in their brief (p. 22): "This interview with McGowan a few days *before* the death of Parish was necessarily after the open breach between Parish and the appellants represented by the letters *supra*" (i. e.,

the letters of November 19, and November 22, 1904). Here again is sought to be utilized the anger which they themselves so wantonly excited. The date of the interview however, is not that given by McKee as counsel here state. Mr. Darlington asked: "This interview (*i. e.*, with McGowan), as I gather from your deposition, was *after* the death of Mr. Parish?" "A. *Yes. Several days after.*" If what counsel term the "open breach" justified the cessation of service to the father from November 22 to December 26, 1904, as heretofore asked, was not this a time peculiarly appropriate to acquaint the daughter, that she had counsel under contract obligation to prosecute her claim and who were ready and anxious to do so. They insist that, on several occasions, by a species of indirection, they designed to give this information to the daughter. Would it not have been more honest, more earnest, and more manly, on at least, some one occasion to have made the attempt to do this directly. Neither Messrs. Cole & Donaldson at one time, nor Mr. Conrad, at another, fathomed the deep design. Certainly McGowan said nothing to suggest it to McKee.

XVI.

The counsel for appellants reply to a point alleged to have been raised in the Appellate Court, as an objection to the decree of the trial Court, viz.: "That if otherwise entitled to recover, the compensation of appellants should have been reduced by the services rendered by counsel employed by the appellee, which services lessened the labor appellants must otherwise have expended (Brief, p. 109). It is added: "No claim of such a deduction is set up in the pleadings or elsewhere in the record" (Brief, p. 113). The counsel for the appellee are prepared to admit, indeed, to insist, that what is not set up in the pleadings cannot be adjudicated; that what is non-apparent in the pleadings is nonexistent for trial.

Counsel for appellee, however, must add, that they are wholly unaware of having made any claim for the reduction of fees to appellants other than the claim that they are entitled to nothing; that is the reduction to nil. At the very time legal ability was needed they deserted their client; told him to look out for himself as best he could, but to expect nothing more from themselves. The fact that the appellants never lifted a finger, acknowledged inability (as stated in the letter of September 15) to offer a suggestion, is decisive of their claims. Full performance was a condition precedent.

XVII.

AUTHORITIES

Failure to prosecute the claim to a "final determination" was a breach of contract fatal to the claim of complainants.

"It is no less repugnant to the well-established rules of civil jurisprudence than to the dictates of moral sense that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it should be permitted to make that very engagement the foundation of a claim to compensation for services under it."

Stark vs. Parker, 2 Pick., 267.

"As the defendant's promise depends on a condition precedent, the condition must be performed before the other party is entitled to receive anything under it. The plaintiff has no right to desert the agreement and recover on a *quantum valebant*."

Cutter vs. Powell, 6 Term Reports, 320.

"If an agent, or attorney, having undertaken to collect a debt for a certain share of what he may recover, finally abandons further effort as useless, and at a subsequent period the principal receives payment, through new instrumentalities or from

causes with which the agent has no connection, he cannot claim the share to which his contract would have entitled him if payment had been secured by his efforts."

Scoville vs. Trustees, 65 Ill., 524.

"When a servant hires himself for a fortnight and quits at the end of ten days, in consequence of rough language from his master, he is not entitled to recover compensation for the ten days' labor."

Marsh v. Ralson, 1 Wend., 514.

"When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract." Fuller, C. J., in *Roehm vs. Horst*, 178 U. S., 1-9. (Affirming *Roehm vs. Horst* in 91 F., 345, where the syllabus is, "Where one party to a contract gives notice of his intention not to perform, the other is justified in treating such action as an anticipatory breach and may sue for damages without waiting for the time of performance.")

"In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated. * * * The English authorities in support of this proposition are unanimous."

Marks vs. Van Eeghen, 85 Fed., 855.

"If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered."

Tenney vs. Berger, 93 N. Y., 529.

Holmes vs. Berger, 129 N. Y., 140-141.

"The fact that the complainant never felt himself aggrieved until the bonds of the company had

risen to their par value, which only occurred *after this court had adjudged on appeal from the Supreme Court of this State* that the stockholders were personally liable for its debts, leads to the inference that the present suit was prompted more by a spirit of speculation than any sentiment that injustice had been done to him. At any rate, the claim now presented is a stale one. The claimant does not set forth *specifically* any grounds which could have constituted impediments to an earlier prosecution of his suit."

Marsh vs. Whitmore, 21 Wall., 184.

"A party who makes an appeal to the conscience of the chancellor should set forth in his bill *specifically* what were the impediments to an earlier prosecution of the claim." *Lansdale v. Smith*, 106 U. S., 392-3. "Otherwise the Chancellor may justly refuse to consider his case, on his own showing" (*id.*, 394).

"No delay for the purpose of enabling the defrauded party to *speculate upon the chances which the future may give him, of deciding profitably to himself, whether he will abide by his bargain, or rescind it, is allowed in a court of equity.* * * * The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property, to voluntarily await the event, and then decide, *when the danger which is over has been at the risk of another, to come in and share the profit.*"

Miller, J., in Twin Oil Lick Co. vs. Marbury, 91 U. S., 587.

"With full knowledge of all these facts, the appellant took no action until after this suit was brought, nearly four years after the sale; and *not until all the hazard was over*, and the defendant's skill, energy, and money had made his purchase profitable, was any claim or assertion of right made."

(*Id.*, 593.)

"Generally speaking, the contract of an attorney or solicitor retained to conduct or defend a suit

is an entire and continuing contract to carry it on until its termination, and if without just cause he quits his client before the termination of the suit he can recover nothing by his bill."

2 Greenleaf on Ev., sec. 142.

"The rule is correctly laid down in *Harris vs. Osborne*, 2 C. & M., 629, where Lord Lyndhurst said: 'I consider that when an attorney is retained to prosecute or defend a cause he enters into a special contract to carry it on to its termination.'"

Parke, B., in *Nicholls vs. Wilson*, 11 M. & W., 106.

Even if the express terms of abandonment did not exist, the delay of complainants of itself justified the employment of other counsel.

"Under such a contract as that existing between Shumway and Sloan, it is the duty of the attorney to exercise reasonable diligence in the prosecution of the suit, and if he fails to do this the client must be at liberty to seek other aid. *If compelled to do this, he cannot be required to execute the original agreement.* * * * We do not see how compensation can be given upon the principle of a *quantum meruit*. The contract is an entirety, and the attorney having failed to perform there can be no apportionment of compensation. * * * We cannot accept any of the excuses offered for the delay as a reasonable explanation. *The question in issue was merely one of law. The proof to be made in order to present the question was of the simplest character.*"

Walsh vs. Shumway, 65 Ill., 475-6.

During the space of nearly two years which had elapsed from the time of the Secretary's decision complainants had taken no action, had proposed no remedy, and the record shows had agreed on none to propose. It was only necessary for one more year of inaction to be added and no remedy at law would remain. Accord-

ing to their own proof, all the testimony, all the law had been repeatedly briefed by them. Had the defendant known of the contract and had it not been abandoned this delay would have justified her in treating it as at an end.

XVIII.

Failure to communicate to appellee information of the contracts under which complainants now claim of itself would have worked the virtual abandonment thereof, even had such contracts been still in existence.

Never once did complainants in speech or writing give any information to the defendant of the contracts under which they claim. In the case which follows there had been a contract prior to a testator's death. The court said:

"We think the referee clearly right in holding that the plaintiff not having notified the executor of the existence of this contract, and *allowing him to employ other counsel for the purpose of carrying on the litigation and thus having abandoned the contract, cannot now claim the sum which it is alleged was agreed to be paid.*"

Bolte vs. Fichtner, 68 Hun., 148-9.

The trial justice uses the language that the defendant ignored their (*i. e.*, complainants') "relation, although she must have known in a general way what it was" (*Id.*, 222). It is respectfully submitted that the terms of a contract cannot be made known "in a general way," but only in a particular way, by the inspection of the contract, or the clear and certain communication of the contents. The mere knowledge that complainants had acted for J. W. Parish was no notice of a contract which would be in force after his death. The defendant might well assume that complainants, who were ex-members of Congress, were employed for the Legislative, or Executive, and not for the Judicial Department.

Where defendant received from his brother for collection certain notes which did not fall due till after the brother's death, "Held, that defendant's agency ceased with the death of his brother."

Darr vs. Darr, 59 Iowa, 81.

Had there been no abandonment, the conduct of complainants was such as to indicate the opinion that their contracts had abated by the death of Parish, and that any further employment (if they wished it) had best be sought through counsel subsequently retained.

XIX.

Were the present appeal from the final judgment of a state court, if you found the judgment therein could be rested on independent and nonfederal ground, adequate to support it, you would esteem the judgment one, not "subject to review in this court." *Holden Land Company v. Interstate Trading Co.*, 233 U. S.

"Where the decision complained of rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court, without considering any federal question that may also have been presented."

Missouri, &c., R. R. v. Fitzgerald, 160 U. S., 576.

The right of appeal from the Court of Appeals of the District of Columbia varies little from that which exists in the case of the highest court of a State. The right of appeal, on the ground of the federal question which has been raised, will, however, be considered without further reference to this point.

By Section 3477 of the Revised Statutes the contract with McGowan and the contract with Brookshire are

made null and void. An interlocutory consent decree, before answer, containing no reference to any defense which would or might be made, did not waive a defense under the statute, as it did not waive any other defense to the bill.

The answer of the defendant (appellee here) on the second page hereof sets out the statute, which makes the contracts of complainants "*null and void*"; viz., said Section 3477, which provides:

"All transfers and assignments made of any claims upon the United States, or of part or share thereof, or of any interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment and must be acknowledged by the person making them before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer, and it must appear by the certificate, that the officer at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

None of the conditions to avoid the sentence—"shall be absolutely null and void," can be found in the case of the contracts, assailed by the answer.

The contract with McGowan provides that the latter shall have "*power to receive and receipt for any draft or other evidence of indebtedness which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated.*" This was

the assignment of 15 per centum of the amount of whatever government draft was received on account of the claim. The assignment to McGowan was so unquestionable and complete, that McGowan was able (December 3, 1902) to assign one-third thereof to Brookshire, by the words, "I hereby *sell, assign, transfer, and set over* to Elijah V. Brookshire the undivided one-third interest in a contract made between Joseph W. Parish and myself bearing date the 4th day of August, 1900," etc.

The contract of January 20, 1903, between Parish and Brookshire for the payment of 5 per cent of the award has: "*This contract to be an order upon the proper officer of the Government, or any one authorized to disburse said award so appropriated, and it is expressly understood that said Brookshire shall have a lien for the amount due him upon the amount of the said award when the same shall be made.*"

The difference between contracts and statute seemed to defendant's counsel to be one admitting of no compromise. Between contracts and statute was "irrepressible conflict."

That the contracts of complainants with Parish are *prima facie* prohibited by said section is practically conceded. It is, however, claimed and by the trial justice decided that by and under a consent decree the defense under the statute was waived. On the 22d of May, 1909, the bill herein was filed and the restraining order prayed for therein granted. Ten days thereafter, viz., 2d of June, 1909, before counsel could well have had time to confer with their client or to look into her case, an interlocutory consent decree was entered, dissolving the restraining order then in force as to all except the sum of \$41,000. This part of the \$181,358.95 awarded by the United States Supreme Court she (the defendant) was directed to turn over to Corcoran Thom, vice-president of the American Security and Trust Company, with power to him "to deposit the same when received with the American Security and Trust Company of Washington, D. C., to the

credit of this cause, and subject to *the further order of this court herein*, and subject to the determination by this court in this cause, *whether any amount, and, if so, what amount is justly due the complainants or either of them* for professional services rendered by them or either of them for and in respect of the matters described in the bill of complaint" (*id.*, 13).

The trial justice holds that the defense under the statute cannot be taken in view of this consent decree, saying: "No other question is reserved. What shall be done with the fund is declared to depend upon these two questions alone—is anything due? If so, how much?" (*id.*, 232). But when the question reserved is: "Whether any amount, and, if so, what amount is *justly* due?" is not everything going to show that no amount is "justly due" necessarily reserved, and when the proof offered to show nothing can be *justly* due is the express word of the statute; can this proof be ruled out because in an interlocutory consent decree, signed ten days after the filing of the bill, the defendant's counsel did not recite the grounds on which they would rely to defeat the claim of abandonment, nor as to any of the evidence which the defendant has produced. Is it all to be ruled out? Were not the contracts, given such prominence in the bill, "matters described in the bill of complaints?" The trial justice asks: "Can there be any doubt that thereby she (the defendant) *has eliminated the question of a lien upon the original fund?*" (*id.*) The defendant's counsel have very honest doubts upon that subject.

The learned trial justice added: "That question has been waived." (Rec., 232.)

Each side equally desired this decree and had reason therefor. Had the fund been suffered to remain in the Treasury, complainants would have been required to give an injunction bond ample to indemnify the defendant for the loss of interest on the fund which had been awarded her. On \$181,000, at six per cent, this would have been an annual loss of \$10,860, which during the five years

this cause has been pending would have amounted to \$54,300. The loss of comfort and welfare on other accounts to the defendant, would have been taken into consideration.

On the other hand there was the consideration to the defendant of the opportunity to withdraw from the Treasury all that was not in controversy.

The defendant and the defendant's counsel, it is plain, little dreamed that the "*waiver*," declared by the trial Justice, had been made. After first stating, that "because of the joinder in the same suit of two wholly distinct and unconnected claims, against the estate of her testator, arising under alleged wholly distinct and unconnected contracts with distinct and unconnected plaintiffs, it would be open to her to take by demurrer the objection of multifariousness," the defendant (here the appellee) expressly foregoes any advantage on this ground. In the next sentence is added, "The question of the validity of said contracts, she is advised, presents a more serious question, and *one which she is not at liberty to waive*" (Rec., 16). She then sets out in full said Section 3477.

Not only, is it obvious, that the executrix was unaware of the waiver of this defense, but it is fair inference that complainants' counsel could hardly have realized it, since to the defendant's answer, they filed their replication to put in issue everything which had been set up as defense to the bill. If the denial of the validity of the contracts had been waived by the consent decree, the replication should not have joined issue thereon, but should have shown that no issue could be raised concerning said section.

"If the matters set up in an answer as a defense have been previously adjudicated it should be set up by plea or replication, upon which issue can be taken, *so as to give the defendant an opportunity to present any evidence he may have on the subject.*"

Thriffs vs. Thriffs, 101 Ill., 458.

"The answer is considered true throughout unless put in issue by a replication; * * * If the complainant wishes to avoid the effect of matter pleaded in bar his proper course is to apply to amend the charging part of his bill."

Fletcher's Equity Pleadings, sec. 356; 2 Dan. Ch. Pr., 829-830-834.

The policy and purpose of interlocutory procedure is to prepare causes for hearing, upon their merits.

"The practice in courts of chancery gives to defendants a reasonable time to interpose a defense by way of demurrer and answer, and it would violate that rule of practice to grant the prayer of the bill merely upon its being filed and *upon a motion for a temporary injunction*. In this case the amended cross-bill had just been filed and appellees had not answered, nor had any steps been taken to place them in default. Unless it is on a bill *pro confesso*, on a decree to file an answer, under the rules of practice, a final decree cannot be rendered *except on a final hearing regularly had*."

Western Union Tel. Co. vs. Pacific & Atlantic Tel. Co., 49 Ill., 93.

The Consent Decree Does Not Present a Case of Res Adjudicata.

It cannot be contended that the appellee is bound on the principle of *res adjudicata*, for that relates to the binding effect of a judgment on the same matter directly in question, and does not relate to any matter incidentally cognizable, nor to any matter to be inferred by argument from the judgment. *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 494.

There is no sign that Judge Barnard ever read, or had been called on to read, a word of the bill; or knew more of it than that it was a bill for an injunction, on which had been issued the usual restraining order. There was no controversy of any matter before the Justice, who

by his signature to the decree brought to him to sign authenticated the agreement out of Court. He could not have decided on the merits; for on one side, the merits had not been pleaded, and were not pleaded for several months thereafter. The conditions for the exclusion of evidence on this ground are: "That the same identical matters shall have come in question already in a court of competent jurisdiction; *that the matter shall have been controverted, and that it shall have been finally decided.*" *Langmead v. Maple*, 114 E. C. L., 270.

How could that have been finally decided which could not have been known to the court for several months after the consent decree?

"The prior decree was the consequence of the consent, and not of the judgment of the court, and this being so, the court had a right to decline to treat it as *res judicata.*" *Laurence Manufac. Co. v. Janesville Mills*, 138 U. S., 561-2.

Nor Does the Doctrine of Estoppel Apply.

In Massachusetts, it was laid down by Shaw, C. J., that "in order to constitute an estoppel, the same point must be put in issue, *upon the Record*, and directly found by the jury." He says: "It results from the established rules of pleading, that this rule must be *strictly* confined to facts put *directly in issue*, and cannot be extended to collateral facts, or *facts to be deduced by inference from the verdict.*" *Eastman v. Cooper*, 15 Pick., 279. "It is necessary that it should appear that the precise point was in issue and decided, and *that this should appear from the record itself.*" *Kennedy v. Scovel*, 14 Conn., 69.

"To points which came only collaterally under consideration, or were only incidentally under cognizance, or *could only be inferred by arguing from the decree*, it is admitted that the rule does not apply." *Hopkins v. Lee*, 6 Wheat, 114.

"It is said, on behalf of plaintiff in error, that the appellees herein are estopped by reason of a finding made in the decree entered on April 24, 1894. * * * *The decree in question was entered by consent.* * * * Former adjudication, to constitute a bar, must have been on what was actually in issue and the determination of which was essential to the issue."

White vs. Sherman, 168 Ill., 612.

"The decrees were *entered by consent*, and in accordance with the agreement, *the courts merely exercising an administrative function, in recording what had been agreed to between the parties*, and it was open to the Supreme Court of Louisiana to determine, upon general principles of law, that the validity of Article VI was not in controversy or passed upon in the causes in which the decrees were rendered."

Texas, &c., Ry. Co. v. Southern Pacific Co.,
137 U. S., 56.

XX.

But had it been the expressed intent of counsel on both sides to "eliminate" from the issues to be tried any question touching the validity of the contracts, "it would have been out of their power to accomplish it, and out of the power of the court to permit it.

"The validity of a contract is to be determined by the state of the law *when it was entered into.*"
Wood on Master and Servant, Sec. 901.

"Courts, even with the consent of the defendant, will not enforce a contract in violation of a statute, *although not expressly made void.*"

Fowler v. Scully, 72 Pa. State, 456.

"Courts are instituted to carry into effect the laws of the country; how can they be made auxiliary to the consummation of violations of law? There can be no civil right, where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal" (*id.*, 466-468).

"Now it is a rule that those who come into a court of justice to seek redress, must come with clean hands, and *must disclose a transaction warranted by law.*" Lord Kenyon, C. J., in *Petrie v. Hannay*, 3 Term Reports, 422.

The complainants, in their bill, disclosed a transaction, not warranted by law; viz., the protection of liens made *null and void* by express statute. The Court, being without jurisdiction to hear a cause, based on a contract prohibited by law, consent of parties, even if put in the form of a consent decree, in so many words condoning the illegality, could not give jurisdiction. "*We are all agreed,*" said Jervis, C. J., *that jurisdiction cannot be given by consent of parties, if we have none without it.*"

Vansittart v. Taylor, 4 Ellis & Blackburn, 912.

In *Ribbans v. Crickett*, the Court took notice of the illegality of a contract on which the action was brought, *although the defendant paid into Court an amount which he acknowledged to be owing by him upon two out of the three charges.* Verdict having been found for the plaintiff, motion was made for a new trial, on the ground, that part of the cause of action was contrary to law.

Eyre, C. J.: "Persons who engage in this kind of transactions must not bring their case before a Court of Law. *With regard to the money paid into Court, it is to be observed, that such payment is only an admission of a legal demand, and we cannot allow it to be applied to an illegal account.*"

1 *Bosanquet & Puller*, 266.

"The instruction given that if the contract was illegal, the illegality had been waived by the reconventional demands of the defendants was founded upon a misconception of the law. In such cases there can be no waiver. * * * The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No

consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons."
Coppell vs. Hall, 7 Wall., 558.

"That defect cannot be gotten rid of either by failure to plead it or by agreeing to waive it in the most solemn manner. *The law will not enforce contracts founded in its own violation.*"
Camp vs. Bruce, 96 Va., 524.

XXI.

Neither the averments of the bill nor the facts offered in evidence sustain the contention, heard for the first time in the argument, of a claim based on an attorney's lien.

The trial justice further holds that complainants do not need to assert any lien by virtue of their written contracts. Why? Because "upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor, they have a lien upon it to the extent of that compensation they are entitled to receive" (*id.*, 221); that such a lien like that adjudicated in *Price vs. Forrest*, 173 U. S., 410, "was one by operation of law and did not come within the statute" (*id.*, 220).

In *Price vs. Forrest* the lien asserted was one that arose under a judgment; it was a judgment lien, a lien not created by any act of the parties, but arising *in invitum*. There had never been an invalid contract under section 3477 or any other section. Every legal lien is a lien by operation of law. But when the contract under which the lien is asserted is illegal *in its inception*, it cannot be legalized thereafter by the appointment of a receiver or by any other proceeding in a suit to enforce it. It were useless to enact the law if such facility of evasion were made part of it.

At the hearing, it was argued by petitioners that their claim in reality is based, not on the contracts set up in their bill, but on an attorney's lien, not set up by any pleading. The liens claimed by the petitioners are not based on an implied agreement for payment of the reasonable value of their services, but on the express contracts carefully set out in their pleading.

After the recital of the contracts the bill avers (par. 4): "Pursuant to the employment *above mentioned* and the agreements *hereinbefore* set forth, the said complainants, in co-operation and together, diligently prosecuted the said claim and rendered valuable legal and professional services in respect thereto."

No other ground for the prosecution of "the said claim" is averred.

Nevertheless, it was said in the trial court, "But do the plaintiffs need to assert any lien by virtue of their written contracts? (*i. e.*, has section 3477 any relevancy to the case?) * * * Treating the question, therefore, as affecting only the plaintiffs and the executrix, are not the plaintiffs entitled to a lien upon the fund, if they are entitled for professional services in producing the fund? Upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor, they have a lien upon it to the extent of the compensation they are entitled to receive. *For these reasons we do not feel embarrassed by section 3477 in dealing with the case, as equity may require.*"

What is an attorney's lien?

(a) It is a lien on papers and documents received by the attorney from his client *and on money collected by him.*

In re Paschal, 10 Wall., 483.

(b) It is a lien upon the decree or judgment *obtained by him for his client* to the extent that the latter has agreed to pay him or, if there is no specific agreement

for compensation, *to the extent to which he is entitled to recover on a quantum meruit.*

Central R. R. vs. Pettus, 113 U. S.

No money was ever collected by appellants; no judgment obtained by them.

There was nothing adjudged by the auditor. The auditor was not empowered to render judgment. In this case claim no judgment or decree has ever been obtained for Parish by petitioners.

The judgment upon which an attorney's lien is claimed in the present case was rendered in a suit instituted by other attorneys in the Supreme Court of the District of Columbia, finally adjudicated in this court, and in which no appearance was entered and no aid of any kind received from or proffered by the plaintiffs. McGowan is shown to have abandoned his client and his cause, after the adverse decision of the Secretary of the Treasury, and the only judgment that was obtained was that rendered by this court through the services of other counsel.

XXII.

Complainants cannot claim an equitable lien on the judgment recovered in an action in which they entered no appearance, assumed no responsibility, in no way took part, nor in any way assisted, at any stage. They are required to show a lien upon a judgment recovered by them in a suit conducted by them.

The lien now asserted by complainants is for services in a wholly different forum from that in which judgment was finally recovered by the defendant, viz., for services before Congress and the Executive Departments. For the conduct of the action in which the defendant prosecuted her cause to a final determination the complainants were not (for that action) "officers of the court." Where a lien is given "upon a judgment it is for services

rendered in the particular action or proceeding in which the judgment was rendered" (*Forbush vs. Leonard*, 8 Minn., 268).

"In the present case the petitioners never came into possession of the moneys claimed; they were procured by the services of other attorneys by legal proceedings subsequent to the date of the petitioner's claim. These subsequent services were necessary to realize anything upon the judgment, and the subsequent attorneys have their own lien upon the judgment and its proceeds for their subsequent services in the cause."

In re Wilson, 12 F., 241-3.

"Compensation for the services of the solicitors in obtaining the judgment in the State court, on which the suit to cancel the fraudulent conveyance is founded, cannot be allowed in the latter suit."

Adams vs. Kehler Milling Co., 38 F., 281.

XX.

The claim that an attorney's lien is a lien by operation of law is not supported by Nutt vs. Knut or Price vs. Forrest.

The opinion proceeds: It is not maintained by the defendant that the contracts were void, so far as they provided for the rendering of services by the plaintiffs and for their receiving compensation therefor. That question is settled by *Nutt vs. Knut*, 200 U. S., 12. Hence we fail to see what the statute has to do with the case in its present posture." The first thing settled by the authority cited is that a contract nearly identical with that between McGowan and Parish "was in some important particulars null and void upon its face." In this case, however, "the plaintiff subsequently amended his petition and asked that in the event of his not being entitled to compensation under the Denver contract he have judgment

for such sum as his services were reasonably worth, which he alleged to be \$30,000." Under the amended pleadings, the case was finally decided. "Some of the defendants by their answers put the plaintiff upon proof of his case, but submitted to the court the question of the reasonableness of his claim for fees" (*id.*, 15). Such being the character of the amended petition, the decree below, Harlan, J., said:

"May be regarded as only giving effect to the agreement as to the basis upon which the attorney's compensation was to be calculated. It did not assume to give him any *lien* upon the claim or any priority in the distribution of the money received by Nutt's personal representative from the United States, nor upon any other money in his hands. Indeed *no lien is asserted by the plaintiff in his pleadings*. While the original petition asserted his right to be paid in accordance with the contract, *the plaintiff claimed if he could not be paid under the contract that he be compensated according to the reasonable value of his services.*"

This opinion related to a cause in which there had been no *abandonment* by counsel, but in which the counsel seeking compensation had prosecuted a client's claim to "a final determination."

The facts in *Price v. Forrest* are as follows: In 1857 Forrest recovered in the Supreme Court of New Jersey a judgment against Price for the sum of \$17,000 and costs. Execution upon that judgment was returned unsatisfied. This was a lien not at all by the voluntary but very distinctly by the involuntary action of the defendant, viz., *by the operation of law* upon all the property and effects of Price. In 1874 the wife of Forrest, as administratrix of his estate, sued out a writ of *scire facias* to revive the judgment and it was revived. In 1891 (thirty-four years after the recovery of the judgment against Price), by an act of Congress approved February 23, 1891, the Secretary of the Treasury was "authorized and directed

to adjust, upon principles of equity and justice, the accounts of Rodman M. Price, late purser," &c. The Secretary of the Treasury found due to Price from the Government \$76,204.08. In 1892 the administratrix of the estate of Forrest filed a petition stating that it had lately come to her knowledge that about \$45,000 was about to be paid to Price by officers of the Treasury, and praying that a receiver of the draft, or other negotiable security, be appointed, and that Price be ordered, on receipt of such draft or security, to endorse the same, to the receiver, *"to the end that the amount thereof might be received by him as an officer of the court and disposed of according to law"* (173 U. S., 412-415).

It was made the duty of the receiver to hold such drafts *subject to the further order of the court*. A bill filed July 5, 1894, alleged the claim on the part of the heirs of Price, that the balance in the Treasury belonged to them, and *not to the receiver*. It was further alleged that the officers of the Treasury Department were desirous of doing right and justice in the premises; and that the Treasurer "neither consented nor refused to do so, *but awaited the determination by some lawful tribunal of the right of the receiver in the premises.*"

In this court it was insisted by the heirs of Price that the orders in the State court assume to transfer the claim of Price in violation of section 3477. This court then reviews the decisions.

As the conclusion of the whole matter this court said: "It is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government, and ordering the claimant to assign the same to such receiver, *to be held subject to the order of the court for the benefit of those entitled thereto*, can be regarded as prohibited by that section" (173 U. S., 425).

It is respectfully submitted that this court did not hold that the mere appointment of a receiver *ipso facto* operated to transfer title to one of the parties to a suit "by

operation of law," but that the order of court assigning the matter in dispute to a receiver to be held until the determination by the court of the party legally entitled thereto was a proper order. Least of all was it held that an attorney's lien effected such transfer "*by operation of law.*" There was no claim of an attorney's lien to be considered. That which obtained respect was the final judgment of the highest court of the State of New Jersey; the most unassailable kind of transfer "*by operation of law.*"

In *Bank vs. Downie* the lien sought by two banks to be established was that created by the assignment of unallowed claims to secure loans, exceeding the value of the assignments made to cover them. The appellee Downie had been appointed receiver of the property of the assignors, who had been adjudged bankrupts. Downie subsequently qualified as trustee "authorized to collect all moneys due the bankrupts from the United States or any of its departments." The court repeats the language of Strong, J., as to section 3477:

"It would seem impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim or any part or share thereof. *It strikes at every derivative interest in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in any others than himself.*" * * * We can not say when the statute declares all transfers and assignments of the whole of the claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim or any part thereof shall be absolutely null and void, that *they are valid and effective as between the parties thereto, and only invalid when set up against the Government.*"

Harlan, J., continues:

"When G. and W. were adjudged bankrupts they were still in law the owners of these claims

against the United States, and all interest therein passed under the bankrupt act to their general creditors. * * * *Any other holding will effect a repeal of the statute by mere judicial construction in disregard of the plain unequivocal intent of Congress*" (218 U. S., 356).

XXIII.

The appellee again invokes the doctrine; A decree must be sustained by the allegations in the pleadings. A claim arising under a quantum meruit, and a lien based thereon is not alleged.

"The bill must contain every fact essential to the plaintiff's cause of action. *For no evidence will be admitted or considered to prove any fact not alleged in it.*"

Foster's Fed. Pr., Sec. 67.

"Where a party gives a reason for his conduct and decision touching anything involved in controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Railway v. McCarthy, 96 U. S., 267.

"In equity the proofs and the allegations must correspond. The examination of the case by the court is confined to the *issues made by the pleadings*. Proofs without the requisite allegations are as unavailing, as such allegations would be without the proofs requisite to support them. * * * It is a just commentary to say that such a litigation is always to be expected in a case like the present. *There are always those ready to gather where they have not sown.*"

Rubber Co. vs. Goodyear, 9 Wall., 793.

"The proofs must be according to the allegations of the parties, and if the proofs go to matters not

within the allegations, the court cannot judicially act upon them, as a ground for its decision, *for the pleadings do not put them in contestation*. The *allegata* and the *probata* must reciprocally meet and conform to each other."

Story, J., in *Harrison vs. Nixon*, 9 Peters, 503.

Only the facts averred become issuable.

"It is hardly necessary to repeat the axioms in the equity law of procedure: That the allegations and the proof must agree; that the court can consider only what is put in issue by the pleadings; *that pleadings without proofs and proofs without pleadings are equally unavailing, and that the decree must conform to the scope and object of the prayers and cannot go beyond them.*"

Washington R. R. vs. Bradleys, 10 Wall., 302.

The prayer of the present bill is for a decree that McGowan is the equitable owner of one-tenth part of the award; entitled to receipt for the same, as having an equitable lien thereon; and a prayer for a similar decree, in favor of Brookshire.

Counsel for complainants expend energy and consume space to prove that when the statute says "absolutely null and void," it means voidable. Counsel for appellee are content to suffer the statute to speak for itself.

XXIV.

Interest is not recoverable on a claim for unliquidated damages, prior to the determination of the principal sum due.

"A claim against a decedent's estate for services is for unliquidated damages until the amount is ascertained, and therefore draws interest only from the time of ascertainment."

In re Hartman's Estate, 35 N. Y. Supp., 495.

"The law does not allow interest on unliquidated damages, and equity follows the same rule."

Van Bensen vs. Van Gaasbeck, 4 Cow., 499.

"The action was brought to recover for professional services as attorney and counsel with a small claim in addition for disbursements. * * *

The suit was, therefore, on a *quantum meruit* for work, labor, and services. It was decided a half century since (3 Cow., 393) that interest was not allowable on an unliquidated claim for work, labor, and services. The rule has been uniformly adhered to in all the courts of this State."

Gallup vs. Perne, 10 Hun., 526.

XXV.

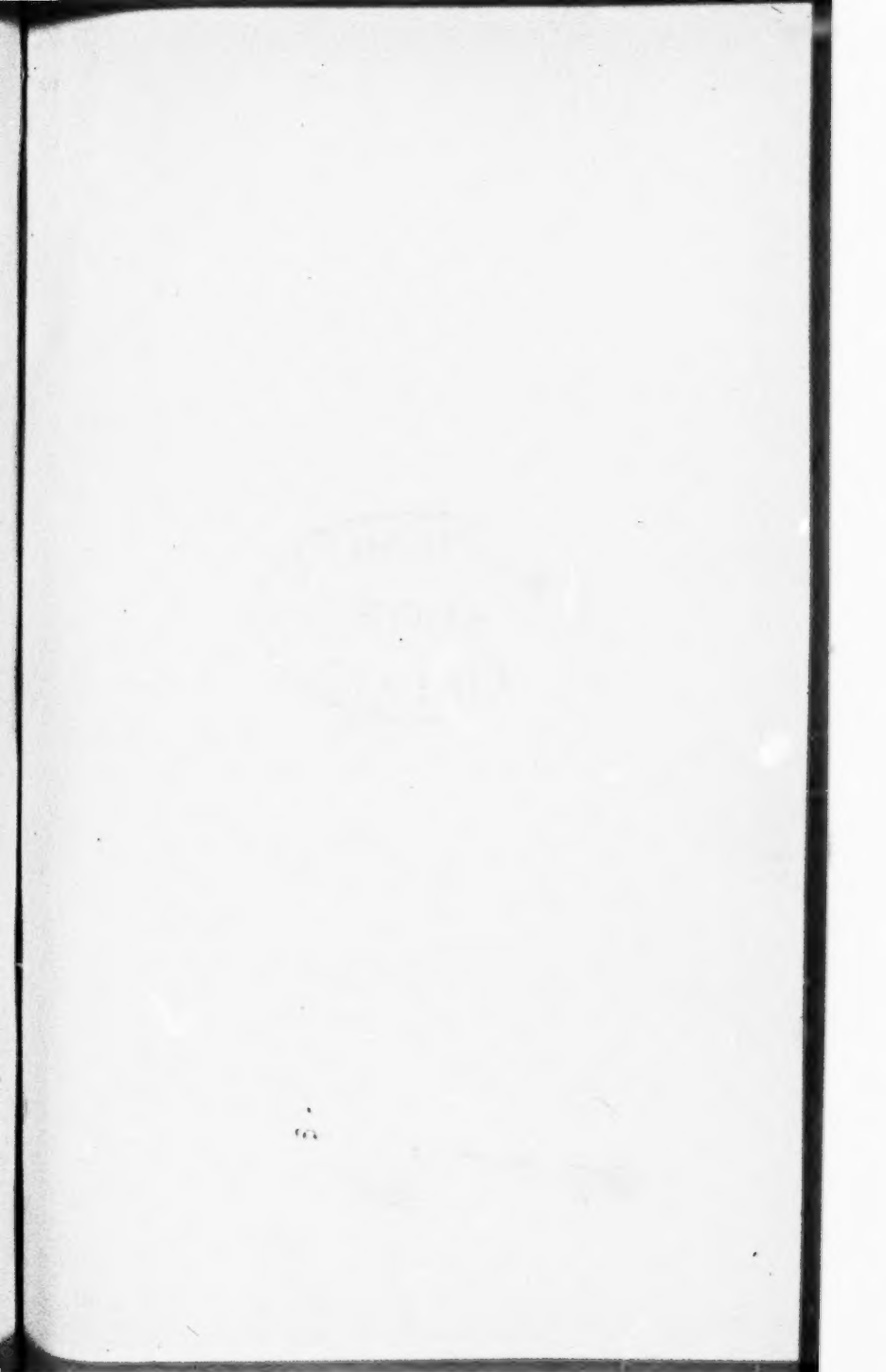
Complainants did not have the right to see without objection the employment of others to prosecute the claim deserted by themselves, and then to claim for the work of others as their own.

Importance is assigned to the following in the agreement between McGowan and Parish: "This agreement shall not be affected in any particular by any revocation of the authority granted or which may be granted to the party of the second part, nor by any services rendered or which may be rendered by others, or by the party of the first part, his heirs or legal representatives, or by any of them." It seems sufficient to say that the provisional exigency herein contemplated did not take place. There was no "revocation" by the party of the first part of the authority granted to the party of the second part. This is an event which never took place. The breach of duty by McGowan in the "revocation" of his own obligation under the contract cannot entitle him or his associates to claim for the performance of duty by another under another contract.

HOLMES CONRAD,

LEIGH ROBINSON,

Solicitors for Appellee.



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Syllabus.

MCGOWAN v. PARISH.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

No. 150. Argued January 25, 26, 1915.—Decided April 12, 1915.

The appellate jurisdiction of this court in all cases coming from the Court of Appeals of the District of Columbia, under § 250, Judicial Code, is general, except those coming under the first class specified in § 250 in which the jurisdiction of the trial court is in issue and is the only question certified.

Where, as in this case, the jurisdiction is invoked on a substantial ground, other than that of jurisdiction, it extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the particular question on which the appeal rests.

Where officers of the Government find that they do not have to invoke the protection of Rev. Stat. § 3477 and are willing to pay the amount of a claim upon the United States, or a portion thereof, into court and so protect the rights of one claiming an interest in the warrant, and all parties consent, and grounds for equity exist, and it is not clear that there is an adequate remedy at law, the court may acquire and exercise equity jurisdiction.

The right of defendant to object to equity jurisdiction on the ground that there is an adequate remedy at law may be waived. Even if the trial court might have dismissed the bill for want of jurisdiction of its own motion, if it did not do so, this court is not called upon to pass upon the question.

A consent decree that the claimed portion of a warrant be deposited in court not only amounts to a clear and express waiver of jurisdictional objections, but renders irrelevant all questions as to whether there was or was not an actual lien on the warrant.

A court of equity should do justice completely and not by halves, and should retain the cause for all purposes even though it be thereby called upon to determine legal rights otherwise beyond its authority. *Camp v. Boyd*, 229 U. S. 530, 551.

In this case held that attorneys originally employed, under a written contract containing a provision against revocation, to collect a claim against the Government and who had rendered substantial services

in connection therewith, but had been superseded by other attorneys over their objection after their offer to proceed with the case, were entitled to compensation to an amount equal to that provided by the contract.

39 App. D. C. 184, reversed.

THE facts, which involve the respective interests of various parties in a claim against the United States which had been adjudicated after a long litigation in the courts in which appellants had at divers times represented the claimants, are stated in the opinion.

Mr. Clarence R. Wilson and *Mr. J. J. Darlington*, with whom *Mr. Nathaniel H. Wilson* was on the brief, for appellants.

Mr. Leigh Robinson, with whom *Mr. Holmes Conrad* was on the brief, for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an equity suit that was commenced in the Supreme Court of the District of Columbia by Jonas H. McGowan and Elijah V. Brookshire, as complainants, against appellee as Executrix of Joseph W. Parish, deceased, together with the Secretary of the Treasury and the Treasurer of the United States, as defendants, in May, 1909, shortly after the decision by this Court of the case of *Parish v. MacVeagh*, 214 U. S. 124, and at a time when, pursuant to that decision, a mandate was about to be issued that would have resulted in paying to appellee, as Executrix, the sum of \$181,358.95, the amount found by the Auditor for the War Department to be due to Joseph W. Parish in his lifetime upon his claim against the Government, known as the "ice claim," mentioned in the opinion of this court in the case just referred to. The object of the suit was to establish and enforce a lien upon the fund for services rendered in the prosecution of the claim. That claim had long been before the courts and

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Congress (*Parish v. United States*, 12 Ct. Claims, 609; 100 U. S. 500; 16 Ct. Claims, 642; Act Feb'y 20, 1886, 24 Stat. 653, ch. 11), when, on August 4, 1900, an agreement in writing was made between Parish and McGowan whereby the former employed the latter as his attorney to prosecute and collect it, agreeing "in consideration of the professional services rendered and to be rendered by the party of the second part [McGowan], and others whom he may employ in the prosecution of said claim," that he, Parish, would pay to McGowan a fee equal in amount to fifteen per centum of whatever might be awarded or collected. McGowan was thereby given control of the prosecution of the claim to its final determination, with power to receive and receipt for any draft or other evidence of indebtedness that might be issued in payment of it, and to retain from the proceeds the amount of the stipulated fee; Parish was to furnish the evidence required and to execute from time to time and deliver to McGowan powers of attorney or other papers necessary for the prosecution and collection of the claim and the payment of the fee; Parish agreed that he would not assign or otherwise dispose of the claim, and that the agreement should not be vacated by any revocation of the authority granted to McGowan, "nor by any services rendered, or which may be rendered, by others, or by the party of the first part [Parish], his heirs or legal representatives, or by any of them;" and McGowan agreed to diligently prosecute the claim to the best of his professional ability to its final determination.

McGowan was a lawyer engaged in practice in the District of Columbia, and after the contract was made, he rendered professional services under it, before Congress and otherwise. In December 1902, McGowan and Parish being desirous of securing the services of the complainant Elijah V. Brookshire as attorney in coöperation with McGowan, the latter made an agreement with Brookshire

giving him an undivided one-third interest in the contract of August 4, 1900, the purpose being to give him 5% of whatever amount should be awarded or collected upon the claim. A short time after this, Parish and Brookshire entered into a written agreement between themselves, by which the former agreed that he would pay to the latter an additional 5% of the amount awarded or appropriated, and that Brookshire should have a lien for the amount due him upon the award when made; and Brookshire agreed to render necessary and proper legal services in the prosecution of the claim under the direction of Parish.

Thereafter McGowan and Brookshire coöperated, and unquestionably rendered services of value. Through their instrumentality, Congress was induced to pass the act of February 17, 1903 (c. 559, 32 Stat. 1612), referring the claim to the Secretary of the Treasury for examination and the payment of any balance found due to Parish under the rule of damages laid down by this court in *United States v. Behan*, 110 U. S. 338, after deducting payments already made. Thereafter, the Secretary of the Treasury referred it to the Auditor for the War Department, who on August 11, 1903, made a finding that there was a balance of \$181,358.95 due to Parish, and notified him through McGowan. The Secretary, however, did not accept this finding, but made further investigation, with the result that on May 31, 1904, having concluded that under the rule in the *Behan Case*, and upon the evidence, no balance was due to Parish, he decided to refuse to pay the amount ascertained by the Auditor, or any sum. Shortly after this, friction and disagreements developed between Parish and the attorneys respecting the next steps to be taken, and they continued until Parish's death, which occurred on December 26, 1904, at his residence in the City of Washington. No active steps were taken, during this period, towards pressing the claim. Parish

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left a will, but no estate other than the claim. His daughter, Emily E. Parish, proved the will and qualified as Executrix thereunder, and in the year 1905 she employed other counsel, through whom, in May, 1906, she filed in the Supreme Court of the District of Columbia a petition for a mandamus against the Secretary of the Treasury to require him to issue a draft in her favor for the amount of the award of the Auditor for the War Department. That court dismissed the petition, and the Court of Appeals of the District of Columbia affirmed its action. 30 App. D. C. 45. But this court, in the case first above mentioned, reversed this judgment, and remanded the cause with directions looking to the allowance of the mandamus.

At this point, as already mentioned, McGowan and Brookshire filed the present bill of complaint against the Executrix, joining the Secretary of the Treasury and the Treasurer of the United States as parties defendant. The bill set up the several contracts made between Parish and McGowan, between McGowan and Brookshire, and between Parish and Brookshire, respectively; set forth the services performed by complainants under those contracts, and the results of those services, including the passage of the act of February 17, 1903, the finding of the Auditor for the War Department, ascertaining a balance of \$181,358.95 due to Parish, and the adverse decision of the Secretary of the Treasury; the subsequent death of Parish; the probate of his will by Emily E. Parish, his Executrix, and the proceedings taken by her in the courts. It also alleged that during Joseph W. Parish's lifetime complainants had advanced money to him for the benefit of himself and his family in sums aggregating \$5,000, relying solely upon his promise to repay the loans out of what might be recovered in respect of the claim; that except for that claim he died insolvent, and was indebted in amounts aggregating about \$25,000; that the defendant, Emily E.

Parish, and her brother, Grant Parish, had avowed and declared that complainants should never receive any part of the money realized upon the claim, and that they were both insolvent, and if they should receive into their hands the draft about to be issued by the Secretary of the Treasury they would immediately take it out of the jurisdiction of the court for the purpose of defrauding and defeating complainants of their rightful lien and claim on the fund; and that complainants were severally the equitable owners of one-tenth part of said sum of \$181,358.95, and entitled to a lien upon the award and finding in respect of that part. The prayers were, in substance, that each of the complainants should be decreed to be the equitable owner of and entitled to one-tenth part of the amount of the award; that the Executrix, the Secretary of the Treasury, and the Treasurer of the United States should be enjoined from receiving or paying over the amount of the award to the detriment of complainants' interests; that a receiver should be appointed to collect the money from the United States and hold it subject to the order of the court; and for general relief. The bill was filed on May 22, 1909, and on the same day a restraining order was made enjoining the Executrix from receiving, and the officers of the Government from paying, the amount of the award. On June 2, with the consent of the respective solicitors for the complainants and the defendant, Emily E. Parish, Executrix, an interlocutory decree was made, dissolving the restraining order and dismissing the bill of complaint as against the Secretary of the Treasury and the Treasurer of the United States, and also dissolving the restraint as against the Executrix; "provided, however, and it is adjudged that in respect of the sum of forty-one thousand dollars and in respect of any warrant, draft or check that may be issued therefor by the Treasury Department, or any officer thereof, as being a part of the award or finding," etc., the Executrix was thereby directed to make a proper

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power of attorney authorizing the Vice President of the American Surety and Trust Company to receive the warrant, draft or check, indorse it in her name as Executrix of Joseph W. Parish, deceased, collect the proceeds, and deposit them with the Trust Company "to the credit of this cause and subject to the further order of this court herein and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint." This consent decree was complied with, to the extent that the Executrix collected from the Treasury Department for the use of the Estate the amount of the award over and above \$41,000, and the latter amount was on June 7, 1909, placed with the Trust Company to the credit of the cause, subject to the order of the court. Jonas H. McGowan died on August 2, 1909, and his Executrix was substituted as a party complainant in his stead. An answer was filed in due course by the Executrix of Joseph W. Parish, proofs were taken, and the cause was brought on to final hearing. The Supreme Court of the District of Columbia made a decree awarding to each of the complainants a sum equal to one-tenth part of the amount of the award, with interest from June 7, 1909. 39 Wash. Law Rep. 586. The Court of Appeals reversed this decree (39 App. D. C. 184), and the present appeal was allowed under § 250, Jud. Code, upon the ground that the construction of Rev. Stat., § 3477, had been drawn in question by the defendant. 228 U. S. 312.

Section 250 allows a review by this court of the final judgments or decrees of the Court of Appeals of the District of Columbia upon writ of error or appeal in six classes of cases. The first is: "Cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the

question of jurisdiction alone shall be certified to said Supreme Court for decision." In the remaining five classes of cases the section imposes no similar restriction upon the scope of the review. In this respect the section is analogous to § 238, which regulates direct appeals and writs of error from the district courts of the United States. Under that section it is held that, in cases other than those that raise alone the question of the jurisdiction of the district court, the appellate review by this court is general. *Siler v. Louis. & Nash. R. R.*, 213 U. S. 175, 191; *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59, 63; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 312, 316. The same rule obtains in cases coming here from a district court under § 266, Jud. Code, where the jurisdiction of that court is invoked upon constitutional grounds and a direct appeal is allowed. *Ohio Tax Cases*, 232 U. S. 576, 586; *Louis. & Nash. R. R. Co. v. Finn*, 235 U. S. 601, 604. A similar rule must be applied to appeals and writs of error taken under § 250, and in the present case our jurisdiction, properly invoked upon a substantial ground specified in the section, other than a question of jurisdiction covered by its first clause, extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the question respecting Rev. Stat., § 3477, or whether it is found necessary to decide that question at all.

The grounds upon which the Court of Appeals denied relief to complainants are, briefly: That contracts like those set out in the bill, so far at least as they attempt to assign or create a lien upon a claim against the United States, are prohibited by § 3477, and thereby made absolutely void; that although this court, in *Nutt v. Knut*, 200 U. S. 12, 21, permitted a similar contract to be employed as evidence of an agreed basis of compensation for an attorney's services in prosecuting a claim, yet that decision was rendered in a case coming from a state court,

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where the complaint did not assert nor did the judgment establish any lien upon the fund claimed from the Government, and under the procedure in the state court the question of jurisdiction in equity to entertain the action did not arise, and perhaps could not have arisen; that the present case differed, because complainants sued upon the contracts as a whole, claiming the fees as fixed thereby, and also claiming a lien, and that "had there been an amendment abandoning the lien and relying on the *quantum meruit* solely, the equity court would have been without jurisdiction;" that aside from the contracts there was no attorney's lien upon which to found jurisdiction in equity, because complainants did not themselves reduce the fund to possession, the Executrix having employed other counsel to do this, as she had a right to do, although not thereby entitled to defeat complainants' right to compensation for the reasonable value of their services previously performed; that the allegation of the insolvency of the Executrix, and her intention to remove the fund from the jurisdiction, furnished no foundation for a resort to equity, because relief could have been given by the Supreme Court of the District as a probate court, which had authority to require the Executrix to give sufficient bond for the protection of creditors, or else to revoke her letters and thus prevent the collection of the judgment; that the interlocutory decree entered by consent of the parties did not help the position of complainants nor estop defendant from attacking the contracts as illegal and void or alleging the failure of complainants to prosecute the claim to final determination; that the decree and defendant's answer furnished a ground upon which complainants might have amended their bill so as to convert the suit into a claim for compensation upon a *quantum meruit*, but that no such amendment was made, the cause being heard upon the theory that the allegations of the original bill were sufficient for the purpose, and there being no

evidence of the reasonable value of the services of the attorneys aside from the express stipulations of the contracts, as to which it was held that they did not furnish a measure of the reasonable value of services which were not completely performed as the contracts contemplated; and thereupon, examining the evidence with a view to determining whether the attorneys had performed the contracts so far as permitted by the claimant and his Executrix, the court reached the conclusion that they had in effect abandoned the contracts during the lifetime of Joseph W. Parish, and had made no tender of further services to the Executrix after his death, and hence, upon the whole case, were entitled to no compensation.

As to the effect of § 3477, Rev. Stat.,¹ it has been several times declared by this court that the statute was intended solely for the protection of the Government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper. *Goodman v. Niblack*, 102 U. S. 556, 560; *Bailey v. United States*, 109 U. S. 432, 439; *Hobbs v. McLean*, 117 U. S. 567, 576; *Freedman's Saving*

¹ SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

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Co. v. Shepherd, 127 U. S. 494, 506; *Price v. Forrest*, 173 U. S. 410, 423. But see *Nutt v. Knut*, 200 U. S. 12, 20.

In this case, the officers of the Government, after the suit was commenced (the claim having already been allowed and finally adjudicated), found that they needed no protection from the statute and were safe in paying into court to the credit of the cause a sufficient amount to answer the claims of complainants. The amount being paid, the court took control of it, and, with the consent of the other parties, dismissed the Secretary of the Treasury and the Treasurer of the United States from the cause. Under these circumstances, and in view of the consent decree, we are not called upon to consider whether the present case is within the reasoning of either of the cases cited, if we decide—as we do—that in view of the contracts, and of the special facts set up in the bill of complaint as above recited, reasonable and sufficient grounds existed for invoking the equity jurisdiction, that the subject-matter was within the cognizance of a court of equity, and that it was by no means clear that an adequate remedy existed at law. The equity jurisdiction having thus been properly invoked, the right of defendant to object because of the alleged existence of a legal remedy could be waived. *Reynes v. Dumont*, 130 U. S. 354, 395; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 536; *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110. It is suggested in the opinion of the Court of Appeals that the trial court in its discretion might, of its own motion, have dismissed the bill for want of jurisdiction. This was not done, and hence we are not called upon to pass upon the question; but we must not be understood as assenting to the suggestion.

The consent decree not only amounted to a clear and express waiver of jurisdictional objections, but it rendered irrelevant, so far as the present parties are concerned, all questions as to the effect of the contracts in creating a

lien upon the proceeds of the ice claim, the effect of § 3477, Rev. Stat., as an obstacle to such lien, the right to a lien independent of the contracts, the right to an injunction or receivership, and other questions, if any, that simply relate to the ground or occasion for coming into equity. These were waived when the court, with the consent of the parties, took physical control of the \$41,000 for the purpose, very clearly expressed in the interlocutory decree, of holding it for the benefit of the respective parties, "subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and in respect of the matters described in the bill of complaint." This language excluded the idea that the determination of any other question—whether contract lien, attorney's lien, or what not—might control the ultimate disposition of the fund. The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal. But "a court of equity ought to do justice completely, and not by halves;" and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. *Camp v. Boyd*, 229 U. S. 530, 551-552, and cases cited. After the making of the consent decree and the deposit of the money in court, the situation of this case was substantially that of an interpleader suit after the making of a decree for interpleader and the dismissal of the stakeholder from the cause, with the issue as between the conflicting claimants limited by stipulation to the determination of the amount "justly due" from the one to the other. That question,

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of course, was and is to be decided according to the equities of the claimants as between themselves, without regard to legal technicalities. *Whitney v. Cowan*, 55 Mississippi, 626, 645, 647.

We also think the ascertainment whether anything, and if so how much, was due to complainants was well within the prayer for general relief, and cannot agree with the Court of Appeals that there was any necessity for amending the bill. Nor could the Executrix, by her answer, raise any issue other than the simple one previously reserved by the consent decree.

The determination of that issue depends chiefly upon the disputed question of fact, whether the attorneys fairly and fully performed their agreements so far as permitted to do so by Joseph W. Parish in his life-time and his Executrix after his death, as the Supreme Court of the District found that they had done; or whether they in effect abandoned performance and refused to complete their duties under the contracts, as the Court of Appeals found that they had done. This in turn depends, for the most part, upon what took place between McGowan and Brookshire and Parish during the summer and autumn of the year 1904; and since two of these were dead at the time of the hearing, and the third (Brookshire) debarred from testifying as to transactions with or declarations by defendant's testator (Dist. Col. Code, § 1064), the evidence bearing upon the question is fragmentary and largely circumstantial. The Court of Appeals laid great stress upon the fact that, so far as appeared, McGowan made no written reply to a certain letter sent to him by Parish in the month of September, while McGowan was on vacation in Canada. It contained the statement: "You will remember before you left Washington for your summer respite, you said substantially that you had done your best to get the Auditor's report in my case paid by the Secretary of the Treasury, and failed, etc., 'that you

turned over to me the case to be managed in the future and do whatever I deemed best, etc.' Sometime next Congress I propose to organize a practical method and resurrect the claim from its unfortunate condition, and I must have unrestricted and unrestrained control"—with other matter intimating but not expressing a desire that McGowan should expressly abandon the case. The letter was rambling, and its purpose not plain. There was nothing in it to require an immediate reply, or to necessitate a reply in writing. McGowan returned to Washington within two weeks after its receipt, and soon afterwards made repeated efforts to obtain a personal interview with Mr. Parish, but without success. It would serve no useful purpose to rehearse the evidence that was introduced to throw light upon the situation and to show the conduct of the parties during this period. We content ourselves with saying that we are unable to concur in the view of the Court of Appeals, and, on the contrary, think that the weight of the evidence shows that up to the time of Mr. Parish's death the attorneys were ready and willing to proceed, but that because of his attitude, as well as by reason of doubts naturally arising from the adverse decision of the Secretary of the Treasury, they were embarrassed about deciding upon the proper course to be followed, among several that suggested themselves: mandamus to the Secretary of the Treasury, a re-hearing before him, a reference to the Court of Claims, or a further application to Congress. Their letter of November 19th, stating: "We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next we shall proceed as we deem best under the ample authority which we have," was, in view of all the circumstances, a reasonable though emphatic notice to Parish that, under the right conferred upon them by the

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contracts and under the power of attorney that they had, they would exercise their own judgment and discretion as to the proper mode of proceeding, unless they could have an interview with him. And Parish's reply, under date November 22, in which, while not disputing their statement that they had sought and he had avoided an interview, he notified them that he would not submit to their proposed action, amounted in effect to a confirmation of what they already had reasonable ground to believe, that he intended to dispense entirely with their services. That they did not proceed without him, as they threatened to do, is easily explainable on the theory that his personal coöperation was practically, although not legally, indispensable.

The evidence further shows that the Executrix had been fully cognizant, during her father's lifetime, of the general situation respecting the ice claim and knew that McGowan and Brookshire were the attorneys in charge of it; she knew Mr. McGowan had advanced considerable sums to her father for his support and hers, and that these advances remained unpaid at his death; the letter of November 19th and a copy of the reply were among her father's papers and came to her knowledge not long after his death; and the circumstances show that she was not willing that McGowan or Brookshire should have anything further to do with the claim, and that they were made aware of this. We think they were not called upon to make an express offer of their services to the Executrix.

Complainants are therefore entitled to compensation; and since the attorneys' services were admittedly of great value, and resulted in securing to Mr. Parish, as this court in effect held in 214 U. S. 124, a complete right to the payment of the money, and since it was his fault and not theirs that the final steps to recover it were not taken by them, no reason is shown why complainants should not receive the entire amount stipulated for in the contracts.

Those instruments may be resorted to as a basis for calculating the compensation of the attorneys, irrespective of any question about their effect as assignments because of § 3477, Rev. Stat. *Nutt v. Knut*, 200 U. S. 12, 21. And the first and foundation agreement in terms provides that it shall not be affected by any revocation of the authority granted to Mr. McGowan, nor by any services rendered by others, or by Parish himself.

The decree of the Court of Appeals is reversed, and the cause remanded, with directions to affirm the decree of the Supreme Court of the District of Columbia and direct the latter court to take further proceedings thereon, if necessary, in accordance with the views above expressed.

Reversed.
